

SUPREME COURT OF THE UNITED STATES

Autumn Term, 1925

No. 51

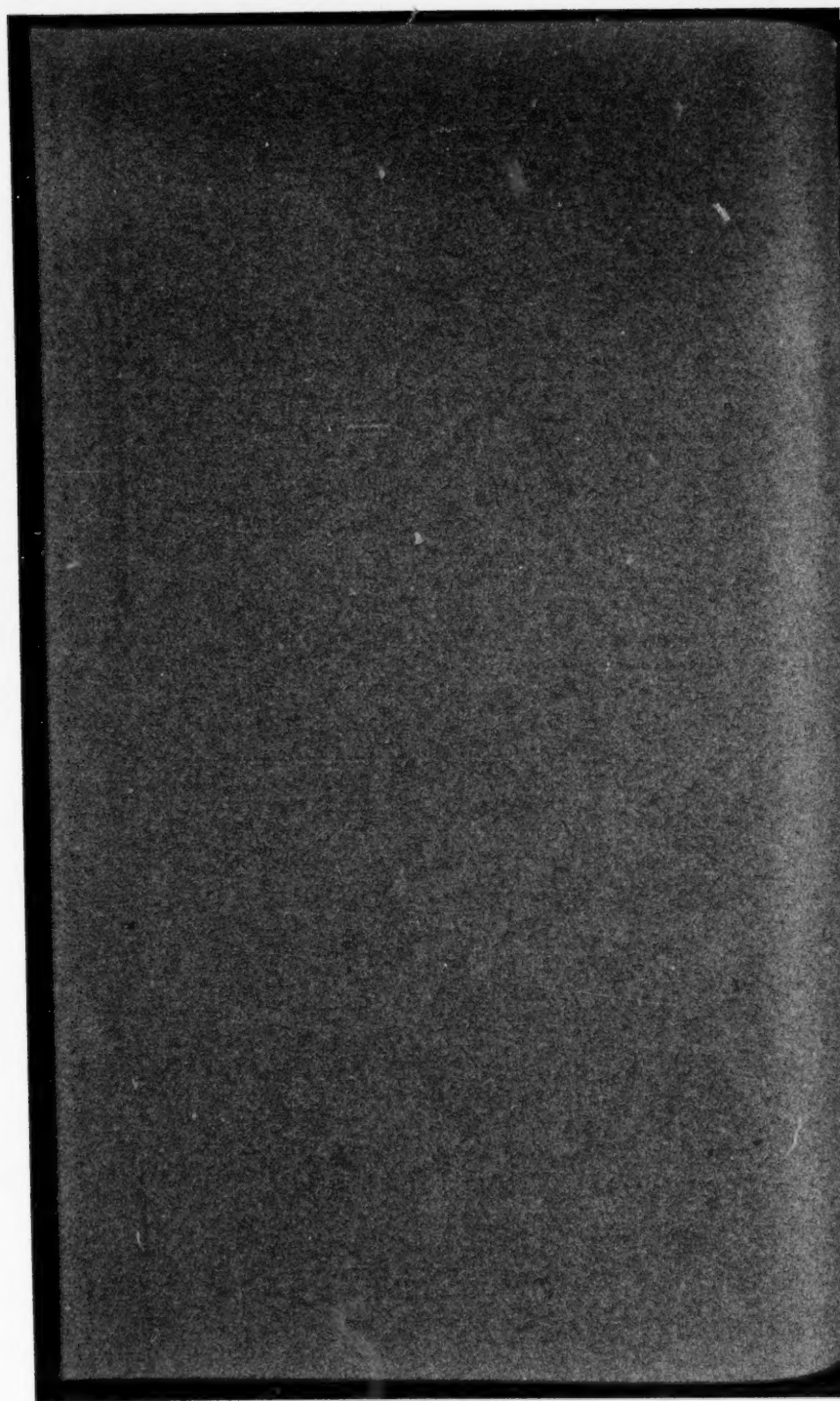
**THE BUCKEYE COAL AND RAILWAY COMPANY AND THE
SUNDAY COKE COAL COMPANY, APPELLANTS,**

**THE HOOKING VALLEY RAILWAY COMPANY, CENTRAL
UNION TRUST COMPANY OF NEW YORK, AND THE
UNITED STATES OF AMERICA**

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF OHIO**

FILED APRIL 24, 1926

(20,301)



(30,291)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 368

THE BUCKEYE COAL AND RAILWAY COMPANY AND THE
SUNDAY CREEK COAL COMPANY, APPELLANTS,

vs.

THE HOCKING VALLEY RAILWAY COMPANY, CENTRAL
UNION TRUST COMPANY OF NEW YORK, AND THE
UNITED STATES OF AMERICA

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF OHIO

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TRANSCRIPT OF RECORD

The United States of America,	}	In Equity. No. 1584.
Plaintiff,		
vs.		
The Lake Shore & Michigan Southern Railway Company, The Hocking Valley Railway Company, The Sunday Creek Coal Company, The Buckeye Coal & Railway Company et al.,		
Defendants.		

PETITION FOR APPEAL.

(Filed February 23, 1924.)

The Buckeye Coal & Railway Company and the Sunday Creek Coal Company, petitioners in the above entitled cause, which is a suit in equity heard under the act of February 11, 1903, entitled:

"An act to expedite the hearing and determination of suits in equity pending or hereafter brought under the act of July second, eighteen hundred and ninety, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' 'An act to regulate commerce,' approved February fourth, eighteen hundred and eighty seven, or any other acts having a like purpose that may be hereafter enacted,"

conceiving themselves aggrieved by the final decree made by the above named court against them, entered on the 18th day of January, 1924, in said cause, do hereby appeal from said decree to the Supreme Court of the United States, for the reasons specified in the assignment of errors, which is filed herewith, and pray that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said decree was made,

duly authenticated, be sent to the Supreme Court of the United States.

William Burry,
William O. Henderson,
Attorneys for said Petitioners.

Dated this.....day of February, 1924.

The foregoing claim of appeal is allowed.

Loyal E. Knappen,
Circuit Judge.

Dated this 21st day of February, 1924.

ASSIGNMENT OF ERRORS.

(Filed February 23, 1924.)

The Buckeye Coal & Railway and The Sunday Creek Coal Company, petitioners in the above entitled cause, pray an appeal from the final decree of the above named court made against them, entered on the 18th day of January, 1924, in the above entitled cause, to the Supreme Court of the United States, and assign as error that:

1. The District Court erred in dismissing the petition of The Buckeye Coal & Railway Company and The Sunday Creek Coal Company filed in said cause on or about December 6, 1921.

2. The District Court erred in denying the relief or any part of it prayed for in said petition.

3. The District Court erred in denying that part of the prayer of said petition, asking "That all the lands of said Buckeye Company be released and eliminated from said mortgage, and particularly from said Section 9 thereof."

4. The District Court erred in denying that part of the prayer of said petition asking "That all interest or interests of said railway company and said trust company in said property be sold and for such other and appropriate order herein as will effectively carry out the purpose and effect of the main decree entered herein" on March 14, 1914.

William Burry,
William O. Henderson,
Attorneys for said Petitioners.

BOND ON APPEAL.

(Filed February 23, 1924.)

Know all Men by These Presents, That we, The Buckeye Coal & Railway Company and The Sunday Creek Coal Company, of Ohio, as principals, and United States Fidelity and Guaranty Company, as surety, are held and firmly bound unto The Hocking Valley Railway Company, Central Union Trust Company of New York and the United States of America in the full and just sum of five hundred dollars, to be paid to the said The Hocking Valley Railway Company, Central Union Trust Company of New York, and the United States of America, their certain attorneys, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our successors, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this twenty-first day of February, in the year of our Lord one thousand nine hundred and twenty-four.

Whereas, lately at a District Court of the United States for the Southern District of Ohio, Eastern Division, in a suit depending in said Court, between The Buckeye Coal & Railway Company and The Sunday Creek Coal Company, of Ohio, petitioners, and The Hocking Valley Railway Company, Central Union Trust Company of New York and the United States of America, a decree was rendered against the said The Buckeye Coal & Railway Company and The Sunday Creek Coal Company of Ohio, and the said The Buckeye Coal & Railway Company and The Sunday Creek Coal Company, of Ohio, having obtained an appeal and filed a copy thereof in the clerk's office of the said Court to reverse the decree in the aforesaid suit, and a citation directed to the said The Hocking Valley Railway Company, Central Union Trust Company of New York and the United States of America, citing and admonishing them to be and appear at a session of the Supreme Court of the United States, to be holden at the city of Washington, within thirty days from the date of the citation issued on said appeal.

Now, the condition of the above obligation is such, that if the said The Buckeye Coal & Railway Company and The Sunday Creek Coal Company, of Ohio, shall prosecute their appeal to effect, and answer all damages and

cost if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

The Buckeye Coal & Railway Company,
By Geo. K. Smith, secretary thereof.
The Sunday Creek Coal Company,
By Geo. K. Smith, secretary thereof.
United States Fidelity & Guaranty Co.,
By R. N. Perkins, attorney-in-fact.

Sealed and delivered in presence of—

E. Ryan,
G. Stark.

Approved by—

Loyal E. Knappen,
United States Circuit Judge.

ORDER ALLOWING APPEAL, ETC.

[Filed February 28, 1924.]

The Buckeye Coal & Railway Company and The Sunday Creek Coal Company, petitioners in the above entitled action, having filed their petition for an appeal herein, and therewith their assignment of errors, now, on motion of W. O. Henderson, one of their attorneys and solicitors, in term time at the same term of the decree below mentioned, it is ordered that their said appeal to the Supreme Court of the United States from the decree heretofore filed and entered herein on the 28th day of January, 1924, be and is hereby allowed as prayed for, the amount of the appeal bond to be given on said appeal being hereby fixed at the sum of \$500, with surety to be approved by the court or a judge thereof or the clerk thereof.

And it now appearing that the appellants have executed their appeal bond in the said sum of \$500 with the United States Fidelity and Guaranty Company as surety thereon, and have presented the same for appeal, said bond and surety are now hereby approved.

Loyal E. Knappen,
United States Circuit Judge.

PRECIPE.

[Filed February 29, 1924.]

To the Clerk of the Above Named Court:

Please make up and certify the record in this cause to be transmitted to the Supreme Court of the United States on the appeal of The Buckeye Coal and Railway Company and The Sunday Creek Coal Company of Ohio, and include in said record the following:

1. The petition for appeal in said appeal.
2. The assignment of errors in said appeal.
3. The bond on said appeal.
4. The order allowing said appeal and approving said appeal bond.
5. The precipe for the transcript on said appeal.
6. The petition filed in this cause on December 6, 1921, by The Buckeye Coal and Railway Company and The Sunday Creek Coal Company of Ohio.
7. The order entered herein on said petition on December 6, 1921, ruling respondents to answer.
8. The answer to said petition, filed herein on January 10, 1922, by The Hocking Valley Railway Company.
9. The answer to said petition, filed herein on January 10, 1922, by the Central Union Trust Company of New York.
10. The reply of The Buckeye Coal and Railway Company and The Sunday Creek Coal Company of Ohio, filed March 21, 1922, to said answers, including the four exhibits attached to said reply.
11. The order entered June 5, 1922, showing the hearing on said petition on said date.
12. The supplemental petition of the United States of America, plaintiff, filed herein November 21, 1922.
13. The order entered herein on January 27, 1923, on said supplemental petition, making The Buckeye Coal and Railway Company and The Sunday Creek Coal Company of Ohio, parties, etc.
14. The answer to said supplemental petition, by The Sunday Creek Coal Company of Ohio and The Buckeye Coal and Railway Company, filed herein February 19, 1923.
15. The answer to said supplemental petition, by The Hocking Valley Railway Company, filed herein March 3, 1923.

16. The answer to said supplemental petition, by the Central Union Trust Company of New York, filed herein March 3, 1923.

17. The order entered June 8, 1923, on said petition and on said supplemental petition showing the hearing thereon said date.

18. The opinion of the court on said petition and supplemental petition, filed herein on January 18, 1924.

19. The order and decree of the court entered herein on January 18, 1924, on said petition and supplemental petition.

20. The order of the court entered herein on February 11, 1924, amending the decree of January 18, 1924.

21. The opinions of the court filed in this cause on December 28, (Dec. 30) 1912. (The opinions appear in 203 Federal Reporter, 295).

22. The final decree entered in this cause on March 14, 1914.

23. The opinion of the court on July 30, 1915, on the petition of The Hocking Valley Railway Company to approve the sale of certain stocks and bonds.

24. The petition of the United States of America, plaintiff, filed herein on October 9, 1915, praying, among other things, that The Hocking Valley Railway Company and the Central Union Trust Company be required to sell the stocks and bonds of certain coal companies, including the stock of The Buckeye Coal and Railway Company.

25. The answer of The Hocking Valley Railway Company to said last mentioned petition, filed herein on the 23rd day of October, 1915.

26. The answer thereto of the Central Union Trust Company of New York, filed herein on the 22nd day of October, 1915.

27. The order of the court, entered on May 19, 1916, upon said last mentioned petition, ordering the sale of the stock of The Buckeye Coal and Railway Company, etc.

28. The petition and report of The Hocking Valley Railway Company, et al., filed herein on the 5th day of October, 1916, reporting the sale of said stock of The Buckeye Coal and Railway Company to John S. Jones.

29. The order of this court, entered November 10, 1916, ordering the entry and order approved by the court on October 7, 1916, to be entered on the journal.

30. The order of this court, approved October 7, 1916, and entered on the journal November 10, 1916, approving and confirming the sale of said stock to said Jones.

31. The statement or certificate of evidence herein for said appeal.

William Burry and
William O. Henderson,

Attorneys for The Buckeye Coal and Railway Company
and The Sunday Creek Coal Company, Appellants.

Acknowledgment of Service.

The undersigned hereby severally acknowledge service of a copy of the foregoing precipe.

The United States of America.

By Benson W. Hough,

U. S. District Attorney, So. District Ohio.

The Hocking Valley Railway Company,

By John F. Wilson, Its Solicitor.

PETITION CONCERNING THE INTEREST RETAINED BY THE HOCKING VALLEY RAILWAY COMPANY AND THE CENTRAL UNION TRUST COMPANY AS TRUSTEE, IN THE COAL LANDS OF THE BUCKEYE COAL AND RAILWAY COMPANY.

[Filed December 6, 1921.]

The Buckeye Coal and Railway Company and The Sunday Creek Coal Company of Ohio, respectfully represent that:

1. When the final decree was entered in this cause on March 14, 1914, The Sunday Creek Company of New Jersey held all the land of The Buckeye Coal and Railway Company under a long time lease and was largely interested in the coal properties of said Buckeye Company.

2. By that final decree The Hocking Valley Railway Company and other railroad companies were perpetually enjoined,

“From directly, or indirectly, owning, holding or acquiring any stock in said Sunday Creek Company or in any of the companies hereinbefore named, the property of which is owned, leased, or controlled by said Sunday Creek Company, intending hereby to impose an absolute prohibition against said railway companies, or any of them, owning or controlling any shares of stock in said

Sunday Creek Company, or otherwise owning or controlling, directly or indirectly, any interest in any of the coal properties in which that company is interested." (Decree, P. 22.).

3. In this honorable court's decision on July 30, 1915, on a petition filed herein after said decree by complainant to compel the railroad companies to comply with the main decree herein, it was held that the Sunday Creek Company controlled the properties of said Buckeye Company and other properties, and on page 2 it was said:

"We cannot too often repeat that the prime purpose of our decree was to insure the complete separation of the railroad interests from the coal mining interests, so that the former should not and could not dominate the latter."

4. When the reorganization and consolidation of railway and coal properties, condemned in the final decree herein, was effected in 1899, said Hocking Railway Company acquired, among other coal properties, all the capital stock of said Buckeye Company, and by virtue of that ownership, pledged said capital stock under, and caused said Buckeye Company to join said Hocking Railway Company in executing the railway company's general consolidated mortgage given to secure \$20,000,000 of bonds, but said Buckeye Company was not required to, and did not sign said bonds. By such joining in said mortgage said Buckeye Company pledged all its coal lands to further secure said railway bonds.

5. In said mortgage said Buckeye Company is referred to as "the coal company" and the Central Trust Company is referred to as the "trustee." Section 9 of Article 2 of said mortgage is as follows:

"Sec. 9: On July 1st, 1900, and on or before July 1st, in each and every year thereafter, the Coal Company shall deliver to the Trustee a statement in writing showing the amount of coal mined from lands owned by the coal company and mortgaged hereunder, during the year ending with the 1st day of March next preceding the date of such statement, and simultaneously it shall pay to the trustee hereunder a sum equal to two cents per ton on all coal so mined during such next preceding year.

All sums so received by the trustee shall by it be used and applied in purchasing bonds hereby secured, in such

manner as to it shall seem best, and at such prices as it shall seem best, not exceeding the rate of one hundred and five per centum and accrued interest. All such bonds when so purchased shall be cancelled. All sums so received by the trustee and not by it so used within six months from its receipt thereof, shall be returned to the coal company."

6. On October 9, 1915, complainant filed in this cause a petition against said Hocking Company and said Central Trust Company asking the compulsory sale by said Hocking Company of the capital stock and bonds of certain coal companies (including said Buckeye Company) which were included in said mortgage and which said Hocking Company continued to retain and own notwithstanding said decree. The Central Trust Company filed its answer thereto on October 22, and said Hocking Company filed its answer on October 23, 1915.

7. In its said answer the Central Trust Company insisted that it held the capital stock of said Buckeye Company under the provisions of said mortgage as security for said bonds; that the bonds were in the hands of many bona fide purchasers for value; that their rights could not be disturbed by this court in this cause, and that it could not be required by this court to part with the capital stock of said Buckeye Company.

8. On May 19, 1916, this court entered an order herein overruling said position so taken by said Central Trust Company in its answer, and ordered that said capital stock of said Buckeye Company be sold free and clear of the lien of said mortgage and that the proceeds thereof be paid to said Central Trust Company to apply on the bonds. In a foot-note to said order of sale the court said:

"We regard as clear the powers of the court to compel the bonds and stock to be sold free from the lien of the consolidated mortgage, substituting therefor in the hands of the mortgage trustee the proceeds of such sale. One who takes a mortgage upon several items of property of such character that their common ownership or operation may offend against the anti-trust law or the commodities clause, and such that the mortgage serves practically to aid in tying them together, must be deemed to hold his mortgage subject to the contingency that if the complete and final separation of one item of the mort-

gaged property from the remainder becomes essential to the due enforcement of either named law, the court charged with such enforcement may take control of that item, free it from the consolidating tendency of the mortgage, and substitute therefore its judicially ascertained equivalent."

"The consolidated mortgage was given by a railroad and a coal company; it challenged attention to those features which carried potential violation of laws already passed or which might be passed."

9. From that order of sale said Central Trust Company appealed to the Supreme Court of the United States, but afterwards in the following November, dismissed said appeal. In October, 1916, the stock of said Buckeye Company was sold to John S. Jones in conformity with said order of sale, and by orders entered in this cause on October 7, and November 10, 1916, said sale was approved.

10. By said Section 9 of Article 2 of said mortgage, said Hocking Railway Company and said mortgage trustee retain an active, valuable interest in the coal lands of said Buckeye Company, contrary to the letter and spirit of said decree of March 14, 1914, in that it is greatly to the advantage of said Hocking Railway Company that there be produced from the mines of the Buckeye Company, as many tons of coal as possible, in order that two cents per ton may go to reduce the bond indebtedness of said Hocking Railway Company. The mines on said Buckeye property are located on the railroad of said Hocking Company, which latter received not only the regular freight rates on coal shipped from said mines but has also two cents on every ton of coal produced applied on the payment of said bonds, and said railway company has, therefore, a strong inducement to furnish better car service and better train service to such mines than to other mines situated on its railroad.

11. Said Section 9 of Article 2 of said mortgage is a covenant not usual in railroad mortgages, is signed by a coal company in favor of bonds issued by a railway company and appears upon the face of said mortgage to be invalid under the principle announced in the aforesaid foot-note in said order of May 19, 1916. Under the provisions of said mortgage all the coal lands of said Buck-

eye Company are now mortgaged to secure said railway company's bonds.

12. In January, 1919, said Central Union Trust Company brought suit in this court, No. 110, on the equity side thereof, against said Buckeye Company to collect from it said two cents per ton on coal mined since 1916, which suit is still undisposed of. The Buckeye Company is resisting that suit. Lately the Ohio Court of Appeals for Perry county has decided in a suit to quiet title and over the contention of your petitioners, that as between your petitioners and the said railroad and trust companies, said Section 9 of Article 2 of said mortgage is valid.

The Sunday Creek Coal Company has succeeded by grant to all the rights, title and interest of the Buckeye Company in and to the lands described in said mortgage.

Wherefore your petitioners pray that proper orders may be entered in this cause, enjoining any demand or collection of said two cents per ton mentioned in said Section 9 of Article 2 of said mortgage, decreeing that all the lands of said Buckeye Company be released and eliminated from said mortgage and particularly from said Section 9 thereof, or that all interest or interests of said railway company and said trust company in said property be sold for such other and appropriate order herein as will effectively carry out the purpose and effect of the main decree entered herein.

And your petitioners will ever pray, etc.

The Buckeye Coal & Railway Company and

The Sunday Creek Coal Company,

By William Burry and W. O. Henderson,

Their Attorneys.

ORDER.

[Filed December 6, 1921.]

On this day came The Buckeye Coal and Railway Company and The Sunday Creek Coal Company of Ohio and presented to the court their petition concerning certain lands in which The Hocking Valley Railway Company and the Central Union Trust Company of New York claim an interest, and prayed leave to file the same herein.

It was thereupon ordered that leave be given to file said petition, which was done. And it was further ordered that copies of said petition be, by petitioners,

served upon the district attorney of the United States for the southern District of Ohio, and upon The Hocking Valley Railway Company and the Central Union Trust Company of New York, and that said railway company, said trust company and said district attorney answer said petition within ten days after service on them of a copy of said petition and of this order.

Dated December 6, 1921.

L. E. Knappen,
A. C. Denison,
Maurice H. Donahue,
Circuit Judges.

**ANSWER OF THE HOCKING VALLEY RAILWAY
COMPANY TO THE PETITION FILED BY THE
BUCKEYE COAL AND RAILWAY COMPANY
AND THE SUNDAY CREEK COAL COMPANY,
DECEMBER 6, 1921.**

[Filed January 10, 1922.]

The Hocking Valley Railway Company, for its answer to said petition, says:

1. It admits that when the final decree was entered in this cause March 14, 1914, the Sunday Creek Company of New Jersey held all the lands of The Buckeye Coal and Railway Company under a long time lease; but denies that the Sunday Creek Company was otherwise interested in the property of The Buckeye Coal and Railway Company.

2. It admits the final decree contains the provision quoted in paragraph 2 of the petition and that an opinion rendered July 30, 1915, contains the sentence quoted in paragraph 3 of the petition; respectfully refers to said decree and the supplemental orders of record in this cause for their true import and effect; and submits that said decree and orders do not affect the validity of said consolidated mortgage, nor of the covenants of The Buckeye Coal and Railway Company therein contained, nor the lien thereof upon the lands in question.

3. In regard to the contents of paragraph 4 of the petition, it admits that when the reorganization of railway and coal properties was effected in 1899, The Hocking Valley Railway Company acquired practically all the capital stock of said Buckeye Company, and by virtue

of that ownership pledged the stock so acquired under the first consolidated mortgage of said The Hocking Valley Railway Company and The Buckeye Coal and Railway Company given to secure \$20,000,000 of bonds; admits that said Buckeye Company was not required to and did not sign said bonds; admits that the Buckeye Company joined in the execution of said mortgage and thereby mortgaged all its coal lands to further secure said bonds; and further says:

The reorganization of 1899 resulted from the foreclosure suit of Central Trust Company of New York v. The Columbus, Hocking Valley and Toledo Railway Company et al., reported in 87 Fed., 815. The Columbus, Hocking Valley and Toledo Railway Company, the defendant in that foreclosure suit, was the predecessor in title to The Hocking Valley Railway Company; and The Hocking Coal and Railroad Company, also a defendant in that foreclosure suit, was the predecessor in title of The Buckeye Coal and Railway Company. There were three mortgages involved in that case. The first was a consolidated mortgage of The Columbus, Hocking Valley and Toledo Railway Company and The Hocking Coal and Railroad Company made to the trustee October 1, 1881, to secure bonds of the railway company, of which \$8,000,000 were issued. That mortgage encumbered the respective properties of these companies, and included the railroad and coal properties covered by the mortgage now in controversy. The bonds secured by the consolidated mortgage of October 1, 1881, were the bonds of the railway company only. The second mortgage involved in that suit was a "joint mortgage" made August 1, 1884, by The Columbus, Hocking Valley and Toledo Railway Company and The Hocking Coal and Railroad Company, upon the same property, to the Knickerbocker Trust Company, as trustee, to secure bonds to the amount of \$2,000,000 issued by the two companies. The third was a general lien mortgage made by the railway company alone October 1, 1886, to the Guaranty Trust Company, to secure bonds of the railway company, of which \$2,133,000 were outstanding. So the court will see that the Hocking Coal and Railroad Company had joined in the execution of the consolidated mortgage involved in that controversy and thereby mortgaged its property to

secure bonds which were obligations only of The Columbus, Hocking Valley and Toledo Railway Company; and that the "joint mortgage" was made by both companies to secure bonds which were obligations of both companies. It appears in that case that the railway company controlled and voted all the stock of the coal company. The trustee of the joint mortgage attacked the validity of the consolidated mortgage so far as it embraced the property of The Hocking Coal and Railroad Company. The court sustained its validity, and ordered a decree of foreclosure. At the foreclosure sale February 24, 1899, the railroad and coal properties were purchased by a committee composed of Melville E. Ingalls, Jr., and George H. Gardiner.

Ingalls and Gardiner, having become as aforesaid the purchasers of the railroad property theretofore owned by The Columbus, Hocking Valley and Toledo Railway Company, and of the coal lands theretofore owned by The Hocking Coal and Railroad Company, sold and conveyed said railroad property to The Hocking Valley Railway Company, and sold and conveyed said coal properties to The Buckeye Coal and Railway Company by deed dated February 25, 1899, hereinafter mentioned; said coal property being necessary and convenient for the corporate purpose of The Buckeye Coal and Railway Company.

And thereupon, under date of March 1, 1899, The Hocking Valley Railway Company duly authorized said issue of \$20,000,000 face value of its first consolidated mortgage $4\frac{1}{2}\%$ gold bonds maturing July 1, 1999, and to secure such issue of bonds said railway company, pursuant to due corporate action, made, executed and delivered said mortgage or deed of trust, dated March 1, 1899, to the respondent Central Union Trust Company, as trustee, under its then name of Central Trust Company of New York, in and by which said mortgage or deed of trust, it granted and conveyed unto said trust company as such trustee certain real and personal property therein described as security for bonds to be issued thereunder.

In order further to secure said bonds of the railway company, and thus induce the purchase thereof by third parties, The Buckeye Coal and Railway Company, pursuant to due corporate action, joined in the execution of said mortgage, and duly delivered the same, and among

other things granted and conveyed to said Central Trust Company as such trustee, said real estate, lands and tenements formerly of The Hocking Coal and Railroad Company; and in order to give added security to said bonds, and to make them more readily saleable, various covenants were made by the grantors in said first consolidated mortgage, and among other such covenants said mortgage contained the following in article 2 thereof, the petitioner Buckeye Company being therein described as the Coal Company, and said Trust Company as the Trustee:

"Sec. 9. On July 1st, 1900, and on or before July 1st in each and every year thereafter, the Coal Company shall deliver to the Trustee a statement in writing showing the amount of coal mined from the lands owned by the Coal Company, and mortgaged hereunder, during the year ending with the 1st day of March next preceding the date of such statement, and simultaneously it shall pay to the Trustee hereunder a sum equal to two cents per ton on all coal so mined during such preceding year.

All sums so received by the trustee shall by it be used and applied in purchasing bonds hereby secured, in such manner as to it shall seem best, and at such prices as it shall deem best, not exceeding the rate of one hundred and five per centum and accrued interest. All such bonds when so purchased shall be canceled. All sums so received by the Trustee and not by it so used within six months from its receipt thereof, shall be returned to the Coal Company."

Said mortgage likewise contains various and sundry other covenants to be performed by the mortgagors; and respondent prays leave to produce at the trial hereof said original mortgage, or a copy thereof, for the purpose of showing to the court the properties conveyed by said grantors therein, and the covenants severally made by them, and of advising the court of the full text and tenor of such grants and covenants and the other terms and provisions of said mortgage.

The facts are that said mortgage was executed and delivered containing the covenants aforesaid, in the circumstances and upon the considerations aforesaid, and in the circumstances and upon the considerations stated in said mortgage, wherein among other things it is recited,

The Buckeye Coal and Railway Company being sometimes referred to as the Coal Company and said Central Trust Company as the Trustee, that

"The Buckeye Coal and Railway Company, the party of the second part hereto, did acquire all of its real estate, lands and tenements hereinafter described and conveyed, by and under a deed thereof made and delivered the twenty-fifth day of February, 1899, whereby, and whereunder said The Buckeye Coal and Railway Company was required, and did agree, in consideration of such transfer, to join in this mortgage and to grant and convey the said real estate, lands and tenements to the Trustee, upon the terms and conditions of this mortgage, for the further security of the said bonds issued and to be issued hereunder by the Railway Company;" and that

"At a meeting of the holders of all of the capital stock of the Coal Company, duly called and held at its office at Columbus, Ohio, on the twenty-fifth day of February, 1899, resolutions were duly adopted by the affirmative vote of the holders of all of the capital stock of the Coal Company, consenting to and approving of the execution of an indenture substantially in the form of these presents, as additional security for the bonds of the Railway Company hereby secured, for an aggregate principal sum not exceeding \$20,000,000;" and that.

"The board of directors of the Coal Company, at a meeting thereof duly held the twenty-fifth day of February, 1899, duly adopted resolutions in the following words, that is to say:

'Resolved, that the president and secretary of the company be, and hereby they are authorized and directed, in its behalf and under the corporate seal, to execute and to deliver to Central Trust Company of New York as trustee, a mortgage or deed of trust to be known as the First Consolidated Mortgage, substantially of the tenor of the draft thereof now submitted at this meeting, upon all of the real estate, lands and tenement of this company heretofore acquired by this company from Melville E. Ingalls, Jr., and George H. Gardiner, upon the express condition, and in consideration of the agreement of this company to grant and convey the said real estate, lands and tenements to Central Trust Company of New York, as trustee, upon the terms and conditions set forth in

the said mortgage, and as additional security for bonds issued and to be issued thereunder for an aggregate principal sum not exceeding twenty million dollars (\$20,000,000), such mortgage to be executed and to be delivered jointly by this company and The Hocking Valley Railway Company.' "

And that, "This indenture is substantially of the tenor of the draft thereof submitted to and approved by the stockholders of the railway company and also by the stockholders of the Coal Company at their said meetings, and submitted to and approved by the board of directors of the Railway Company and also by the board of directors of the Coal Company at their said meetings;" and further:

* * * * *

"And the Coal Company, the party of the second part, in consideration of the premises, and of the purchase and acceptance of such bonds by the holders thereof, and of the sum of one dollar to it by the trustee duly paid, at or before the ensealing and delivery of these presents, the receipt whereof hereby is acknowledged, has executed and delivered these presents, and has granted, bargained, sold, aliened, remised, released, conveyed, confirmed, assigned, transferred and set over, and by these presents does grant, bargain, sell, alien, remise, release, convey, confirm, assign, transfer and set over, unto the Trustee, the party of the third part, its successors and assigns forever:

All and singular the real estate, lands and tenements formerly of The Hocking Coal and Railroad Company," and so forth, describing the lands in question.

And respondent pleads that petitioners herein are estopped from denying the recitals of said mortgage.

Said mortgage further provided, in Article 1 thereof, that all bonds to be secured thereby, from time to time, should be executed, and should be delivered by said railway company to said trustee for certification, and thereupon, as provided in said article, the trustee should certify and deliver the same; and that only such bonds as should bear thereon such certificate should be secured by said indenture or entitled to any lien or benefit thereunder; and that every such certificate of said trustee, upon any bond executed in behalf of said railway com-

pany, should be exclusive evidence that the bond so certified was duly issued under said mortgage, and is entitled to the benefit thereof. Subsequently to the execution and delivery of said mortgage or deed of trust as aforesaid, and prior to the filing of the bill in this suit, the Central Trust Company as such trustee, did in conformity with the terms of said mortgage duly certify \$16,156,000 face value of bonds executed and delivered by and in behalf of said railway company, in conformity with the terms of said mortgage, payable to bearer and intended for general circulation, and thereupon each and all of said bonds so certified were duly delivered pursuant to the terms of said mortgage, and all of said bonds were duly issued; and of said bonds so issued, \$16,022,000 face value, are now outstanding in the hands of numerous bona fide holders for value, and are entitled to the full benefit and security of said mortgage.

Said mortgage was forthwith filed for record and recorded in each of the counties wherein the real and personal property therein described was and is situated or employed, including the counties hereinafter specifically named, and was delivered to the recorder of said Hocking county for record and filed for record in the office of said recorder on March 4, 1899, and duly recorded in the mortgage records of said office in volume 21, at pages 3 to 67, inclusive; and was delivered to the recorder of said Perry county for record and filed for record in the office of said recorder on March 18, 1899, and duly recorded in the mortgage records of said office in volume 5 at pages 129 to 180, inclusive; and was delivered to the recorder of said Athens county for record and filed for record in the office of said recorder on March 20, 1899, and duly recorded in the mortgage records of said office in volume 33 at pages 1 to 51, inclusive.

4. It admits the allegations of paragraph 5 of the petition; and refers to and adopts what it has already said with respect thereto in paragraph 3 of this answer.

5. It admits that on October 9, 1915, the complainant, United States of America, filed a petition in this cause asking for an order that The Hocking Valley Railway Company be required to sell stocks and bonds of certain coal companies (including the stock of said Buckeye Company) which were pledged under said mortgage; and

that the Central Trust Company as trustee filed its answer thereto October 22, and said Hocking Company filed its answer thereto October 23, 1915; but the respondent denies that the Hocking Company then continued to retain and own said stock and bonds contrary to said decree; and refers to said proceedings and the adjudication thereof and to what is hereinafter said on that subject in paragraph 8 for an exact statement of the situation with respect thereto.

6. In regard to the allegations of paragraph 7 of the present petition, the respondent refers to said answer of Central Trust Company to said petition of the United States, for a true statement of its contents.

7. It admits that the matter quoted in paragraph 8 of the petition is contained in a foot-note to said order of May 19, 1916; and refers to said order and the foot-notes thereto of record in this cause, for their true import and effect.

8. It admits the Central Trust Company appealed from said order of May 19, 1916, and in the following November dismissed said appeal; and admits that on or about November 10, 1916, the stock of said Buckeye company was sold to John S. Jones in conformity with said order of sale with an order approving said sale of date October 7, 1916, entered in this cause November 10, 1916; and further says: Said Jones or he and others represented by him in said purchase have ever since been and now are the real or beneficial owners of all said stock, and will be the sole beneficiaries of any order or decree herein in favor of the petitioners. Said sale was made by and pursuant to a written contract dated October 7, 1916, by and between The Hocking Valley Railway Company, of the first part, The Chesapeake and Ohio Railway Company, of the second part, and John S. Jones, of the third part.

In and by said contract, it was recited and agreed by and between said parties, as essential terms thereof, that The Buckeye Coal and Railway Company is a corporation organized under the laws of Ohio, with an authorized capital stock of \$250,000, divided into 2500 shares of the par value of \$100 each, all of which was then outstanding; that The Hocking Valley Railway Company theretofore acquired all said outstanding capital stock

and duly pledged and deposited the same, (except five shares held by directors thereof), under said first consolidated mortgage, made by The Hocking Valley Railway Company and The Buckeye Coal and Railway Company to Central Trust Company of New York, Trustee, securing an authorized issue of \$20,000,000 of first consolidated mortgage 4½% gold bonds of The Hocking Valley Railway Company, and that said stock was then deposited with and held by said trustee under said mortgage; that under date of April 30, 1908, The Hocking Valley Railway Company entered into a trust agreement with said Central Trust Company of New York, as trustee, whereby all said stock was, subject to the lien of said first consolidated mortgage, conveyed to said Trust Company, in trust to dispose of the equity in said stock, subject to the lien of said mortgage and the rights of said trustee thereunder, when and as directed in writing by the holders or owners of record of a majority in amount of the stock of The Hocking Valley Railway Company; that The Chesapeake and Ohio Railway Company then owned more than a majority of the stock of The Hocking Valley Railway Company, and was therefore entitled under said trust agreement last mentioned to give directions for the disposal of said equity in said stock; that by said mortgage The Buckeye Coal and Railway Company conveyed certain real estate in said mortgage described, as further security for the payment of said mortgage bonds, and among other things agreed to pay the said trustee thereunder, a sum equal to 2c a ton on all coal mined from the property of The Buckeye Coal and Railway Company so mortgaged, to be applied in purchasing bonds secured by said mortgage; and that The Hocking Valley Railway Company and The Chesapeake and Ohio Railway Company desired to procure the release of said stock of The Buckeye Coal and Railway Company from the lien of said first consolidated mortgage, and desired to effect the sale thereof, and said John S. Jones desired to purchase the same, upon the terms and conditions in said contract provided.

And thereupon, and in consideration of the premises so recited, it was agreed by and between said parties that The Hocking Valley Railway Company should forthwith make due application to said trustee under said mort-

gage to release from the lien thereof said stock of The Buckeye Coal and Railway Company, in accordance with the provisions of said mortgage; that The Chesapeake and Ohio Railway Company, as owner of more than a majority of the outstanding stock of The Hocking Valley Railway Company, should take due action to procure the sale by The Hocking Valley Railway Company and by said trustee under said trust agreement of April 30, 1908, of said stock of The Buckeye Coal and Railway Company, and that the action so provided for having been taken and said stock delivered to said Jones, together with resignations of all officers and directors requested by him, said Jones would pay simultaneously with such delivery, to the Central Trust Company as trustee, in cash, in respect of said stock of The Buckeye Coal and Railway Company the sum of \$50,000, said stock to be delivered to said Jones endorsed in blank for transfer.

Said stock of The Buckeye Coal and Railway Company, agreed to be sold as aforesaid, was so sold for said price of \$50,000, in consideration of the facts so recited that said property was incumbered as aforesaid, an abatement being made on that account in the price that otherwise said stock would have sold for, as without said encumbrance of said property said stock would have been of much greater value; all of which said Jones then well knew.

And in further consideration of said sale to him as aforesaid, said Jones in and by said contract further agreed that he thereby waived and released any and all claims of every character against The Hocking Valley Railway Company, The Chesapeake and Ohio Railway Company, or said Central Trust Company, by reason of any liability or claim which might be asserted by said The Buckeye Coal and Railway Company by reason of any matter or thing in connection with the ownership of said stock or the management of said company from the organization thereof to the date of the delivery of said stock under said agreement.

And The Hocking Valley Railway Company and The Chesapeake and Ohio Railway Company, in and by said contract, did waive and release any and all claims of every character and description against said The Buckeye Coal and Railway Company and said purchaser, or

either of them, by reason of any liability or claim which might be asserted by The Hocking Valley Railway Company, The Chesapeake and Ohio Railway Company, or either of them, against The Buckeye Coal and Railway Company, by reason of any matter or thing whatsoever occurring to the date of said agreement; except, it was therein provided, that nothing contained in said agreement was intended or should be construed in any wise to limit or affect or impair the several covenants or obligations of The Buckeye Coal and Railway Company contained in said first consolidated mortgage.

And it was further agreed in and by said contract that if The Hocking Valley Railway Company should at any time default in the payments or obligations imposed on it by said consolidated mortgage, and said mortgage should be enforced or foreclosed in any way or to any extent, The Hocking Valley Railway Company would cause all the properties of The Hocking Valley Railway Company to be first exhausted before any recourse is had under said mortgage to the property of The Buckeye Coal and Railway Company and would indemnify and save and hold harmless said The Buckeye Coal and Railway Company from any loss or damage to or payment of said The Buckeye Coal and Railway Company, under the provisions of said mortgage, save only said 2c a ton above mentioned.

And said parties to said contract therein mutually agreed that said contract should inure to the benefit of and be binding upon the parties thereto, and their respective successors and assigns.

Said order in this suit of May 19, 1916, to comply with which said sale was negotiated, required that said contract should be, and it was expressly made, subject to the approval of this court; and in pursuance of that requirement, the parties to said contract appeared in this suit for that purpose, and duly submitted said contract to this court and thereupon, by its order of October 7, 1916, this court found that said purchaser was satisfactory to the court, and that said sale complied with said order entered May 19, 1916, and that the terms of said contract of sale were, and the amount of cash paid for said stock was, such as to fully protect the interests of the Central Trust Company as such trustee, and that the price proposed

to be paid for said stock was the reasonable value thereof, and thereupon it ordered that said sale and the terms thereof as embodied in said contract be, and the same thereby were, approved, and that the Central Trust Company as such trustee, upon due application to it in accordance with the terms of said first consolidated mortgage, as provided in said contract, release said stock from the lien of said mortgage upon the payment to it of the purchase price thereof; which said order was duly entered in said cause November 10, 1916, upon the dismissal of an appeal taken by the Central Trust Company from said order of May 19, 1916, and thereupon on or about said November 10, 1916, said sale was consummated in accordance with the terms and conditions of said contract.

This respondent further pleads that the petitioners herein, and those beneficially interested in them as aforesaid, by reason of the premises, are estopped from denying the validity of said mortgage and the covenants of The Buckeye Coal and Railway Company therein contained.

9. It refers to said mortgage as defining the interests of the respondents respectively in the coal lands of said Buckeye company under said section 9 and said mortgage; denies that any such interest is contrary to the letter or spirit of the decree of March 14, 1914; admits that some of the mines of said Buckeye company are located on the railroad of The Hocking Valley Railway Company; but denies that said provision for the payment of said 2c a ton is any inducement to the railway company to furnish better service to said mines than to other mines situated on its railroad.

10. It denies that the covenant of said section 9 is unusual in said mortgages; admits that it is signed by a coal company, upon the considerations herein recited, in order as aforesaid to further secure bonds issued by a railroad company; admits that under the provisions of said mortgage all the coal lands of said Buckeye company are now mortgaged to secure said railway company's bonds; but denies that said mortgage or covenant is invalid or appears so to be.

11. It admits that in January, 1919, the Central Union Trust Company brought suit in this court, No. 110, on

the equity side thereof, against The Buckeye Coal and Railway Company to collect from it said 2c a ton on coal mined since March 1, 1916, which suit is still undisposed of, and that said Buckeye Company is resisting the same. It also admits that the Court of Appeals for Perry county, Ohio, March 4, 1921, in the suit hereinafter more particularly mentioned, and over contention of the petitioners herein, decided that said section 9 of article 2 of said mortgage is valid. And further in respect of said suits, this respondent says:

12. On or about April 17, 1919, said John S. Jones, having theretofore acquired all the capital stock and securities of The Buckeye Coal and Railway Company and of two other corporations known respectively as Sunday Creek Coal Company of New Jersey and The Ohio Land and Railway Company, in order to bring about a consolidation of the properties of said companies under one corporation, caused The Sunday Creek Coal Company aforesaid to be incorporated under the laws of Ohio, and on or about May 1, 1919, in order to effect such consolidation, caused each of said three corporations in this paragraph first named to convey, and they each did convey, all of their respective properties to said The Sunday Creek Coal Company for a nominal consideration, in consideration of the fact that the latter company exchanged with said John S. Jones all its capital stock for said stock and securities of said three other companies; which conveyance of The Buckeye Coal and Railway Company included the lands owned by that company and mortgage under said first consolidated mortgage, said lands being situate in the counties of Hocking, Perry and Athens in the State of Ohio.

13. Among the covenants and provisions of said mortgage the following are made and provided in Article Ten thereof, The Hocking Valley Railway Company being therein referred to as the Railway Company and The Buckeye Coal and Railway Company as the Coal Company:

"Section 1. All the covenants, stipulations, promises and agreements in this indenture contained, by or in behalf of the Railway Company or of the Coal Company, severally and respectively, shall bind such company, its successors and assigns, whether so expressed or not.

Sec. 2. Nothing contained in this indenture or in any bond hereby secured, shall prevent any consolidation, or merger of the Railway Company or of the Coal Company with each other or with any other corporation or any conveyance and transfer, subject to the continuing lien of this indenture and to all the provisions hereof, of all the mortgaged and pledged premises as an entirety to a railroad corporation at that time existing under and by virtue of the laws of any state or states, and entitled to acquire the same; provided, however, that such consolidation, merger or sale shall not impair the lien and security of this indenture, or any of the rights or powers of the trustee, or of the bondholders hereunder, and that upon such consolidation, merger or sale, the due and punctual payment of the principal and interest of all of the said bonds according to their tenor, and the due and punctual performance and observance of all the covenants and conditions of this indenture, shall be assumed by the corporation formed by such consolidation or merger, or purchasing as aforesaid."

14. From and after March 1, 1916, The Buckeye Coal and Railway Company continued to own said lands referred to in Section 9 of Article Two of said mortgage, and to mine or cause to be mined coal therefrom, up to the time of its said conveyance of May 1, 1919; and thereafter The Sunday Creek Coal Company, as its successor and assign as aforesaid, continued to own said lands, and to mine or cause to be mined coal therefrom up to the present time, and is continuing to do so; yet said petitioners, and each of them, have failed and refused to deliver to the trust company the statements required by said Section 9, and also have failed and refused to pay to said trust company a sum equal to two cents a ton on all coal mined from said lands, for the years ended March 1, 1917, March 1, 1918, March 1, 1919, March 1, 1920, and March 1, 1921, or any part thereof.

15. On or about April 21, 1919, said The Buckeye Coal and Railway Company, as plaintiff, commenced a civil action against the Central Union Trust Company and The Hocking Valley Railway Company, as defendants, in the Court of Common Pleas of said county of Perry, to quiet its title to said lands, being case No. 5895 in said court. On or about November 12, 1919, The Sunday Creek Coal

Company had itself made a party plaintiff to said action, and thereupon entered its appearance therein as such plaintiff, and thereafter participated as such a plaintiff in the litigation. In said cause, and upon the pleadings therein, there was an issue between the parties as to the validity of said mortgage and covenants, including the matters and things now set up in respect thereof in the petition of the petitioners herein, and upon the trial thereof, the Court of Common Pleas by its judgment upon the merits duly given and entered on or about January 8, 1920, found and adjudged the same against the plaintiffs therein and in favor of the defendants therein, sustaining the validity of said mortgage and covenants.

Thereupon, the plaintiffs in said action appealed said cause to the Court of Appeals for said county, being case No. 70 in that court, and at the trial of said cause upon appeal, upon the same issues, said Court of Appeals by its judgment upon the merits duly given and entered on or about March 4, 1921, found and adjudged the same in favor of the defendants therein and against the plaintiffs therein, and did order, adjudge and decree that said first consolidated mortgage and the covenants of The Buckeye Coal and Railway Company therein contained are valid and binding obligations, and a good and valid lien upon the real property in said mortgage described, and that the petition of the plaintiffs therein be and the same was dismissed upon the merits, with costs; and the plaintiffs therein having thereupon filed a motion for a new trial, said Court of Appeals, on consideration thereof, overruled said motion; to all of which the plaintiffs therein did except and take their bill of exceptions thereto.

Thereafter on or about May 5, 1921, the plaintiffs in said cause, filed their motion in the Supreme Court of Ohio, which was given case No. 17047 in that court, for an order directing said Court of Appeals to certify the record in said cause to the Supreme Court for review; on consideration whereof, said court on or about June 7, 1921, overruled said motion; and said judgment and proceedings of said Court of Appeals are in full force and unreversed and are res adjudicata and conclusive upon the parties to said suit as to the validity of the mortgage and the covenants aforesaid, and the petitioners herein,

and each of them, are and ought to be estopped from denying the validity thereof.

The Hocking Valley Railway Company,
By John F. Wilson, of
Wilson & Rector,
Its Solicitors.

Lawrence Maxwell,
A. C. Rearick,
John F. Wilson,
Of Counsel.

**ANSWER OF CENTRAL UNION TRUST COMPANY
OF NEW YORK, TO THE PETITION FILED BY
THE BUCKEYE COAL AND RAILWAY COM-
PANY, AND THE SUNDAY CREEK COAL COM-
PANY, DECEMBER 6, 1921.**

[Filed January 10, 1922.]

Central Union Trust Company of New York, for its answer to said petition, says:

1. It admits that when the final decree was entered in this cause March 14, 1914, the Sunday Creek Company of New Jersey held all the lands of The Buckeye Coal & Railway Company under a long time lease; but denies that The Sunday Creek Company was otherwise interested in the property of The Buckeye Coal and Railway Company.

2. It admits the final decree contains the provision quoted in paragraph 2 of the petition, but alleges that at the time said final decree was made and entered it was not a party to the action, having been brought in after the date thereof by supplemental summons, and that therefore it had no opportunity prior to such decree to submit to the court evidence in support of its position and none of the findings therein are binding upon it. It further admits that an opinion dated July 30, 1915, contains the sentence quoted in paragraph 3 of the petition. It respectfully refers to said decree and to the supplemental orders of record in this court for their true import and effect; and further submits that said decree and orders have no bearing upon said first consolidated mortgage, nor of the covenants of The Buckeye Coal and Railway Company therein contained, nor the lien thereof upon the lands in question.

3. In regard to the contents of paragraph 4 of the petition, it admits that when the reorganization of railway and coal properties was effected in 1899, The Hocking Valley Railway Company acquired practically all the capital stock of said Buckeye Company and by virtue of that ownership pledged the stock so acquired under the first consolidated mortgage of said The Hocking Valley Railway Company and The Buckeye Coal & Railway Company given to secure \$20,000,000 of bonds; admits that said Buckeye Company was not required to and did not sign said bonds; admits that the Buckeye Company joined in the execution of said mortgage and thereby mortgaged all its coal lands to further secure said bonds; and further says:

The reorganization of 1899 resulted from the foreclosure suit of Central Trust Company of New York v. The Columbus, Hocking Valley and Toledo Railway Company, et al., reported in 87 Fed. 815. The Columbus, Hocking Valley and Toledo Railway Company, the defendant in that foreclosure suit, was the predecessor in title to The Hocking Valley Railway Company; and The Hocking Coal and Railroad Company, also a defendant in that foreclosure suit, was the predecessor in title of The Buckeye Coal and Railway Company. There were three mortgages involved in that case. The first mortgage involved was a consolidated mortgage of The Columbus, Hocking Valley and Toledo Railway Company and The Hocking Coal and Railroad Company, made to the Central Trust Company as trustee and dated October 1, 1881, to secure bonds of the railway company, of which \$8,000,000 were issued; that mortgage encumbered the respective properties of those companies, and included the railroad and coal properties covered by the mortgage now in controversy. The bonds secured by the consolidated mortgage of October 1, 1881, were the bonds of the railway company only. The second mortgage involved in that suit was a "joint mortgage," made August 1, 1884, by The Columbus, Hocking Valley and Toledo Railway Company, and The Hocking Coal and Railroad Company, upon the same property, to the Knickerbocker Trust Company, as trustee, to secure bonds to the amount of \$2,000,000 issued by the two companies. The third mortgage was a general lien mortgage made by the railway company alone

and dated October 1, 1886, to the Guaranty Trust Company, to secure bonds of the railway company, of which \$2,133,000 were outstanding. So the court will see that The Hocking Coal and Railroad Company had joined in the execution of the consolidated mortgage involved in that controversy and thereby mortgaged its property to secure bonds which were obligations only of The Columbus, Hocking Valley and Toledo Railway Company; and that the "joint mortgage" was made by both companies to secure bonds which were obligations of both companies. It appeared in that case that the railway company controlled and voted all the stock of the coal company. The trustee of the joint mortgage attacked the validity of the consolidated mortgage so far as it embraced the property of The Hocking Coal and Railroad Company. The court sustained its validity; and ordered a decree of foreclosure. At the foreclosure sale, February 24, 1899, the railroad properties and coal properties were purchased by a committee composed of Melville E. Ingalls, Jr., and George H. Gardiner.

Ingalls and Gardiner, having become as aforesaid the purchasers of the railroad property theretofore owned by The Columbus, Hocking Valley and Toledo Railway Company, and of the coal lands theretofore owned by The Hocking Coal and Railroad Company, sold and conveyed said railroad property to The Hocking Valley Railway Company, and sold and conveyed said coal properties to The Buckeye Coal & Railway Company by deed dated February 25, 1899, hereinafter mentioned; said coal property being necessary and convenient for the corporate purpose of The Buckeye Coal & Railway Company.

And thereupon, under date of March 1, 1899, The Hocking Valley Railway Company duly authorized said issue of \$20,000,000 face value of its first consolidated mortgage 4½% gold bonds maturing July 1, 1999, and to secure such issue of bonds said railway company, pursuant to due corporate action, made, executed and delivered said mortgage or deed of trust, dated March 1, 1899, to this respondent as trustee, under its then name of Central Trust Company of New York, in and by which said mortgage or deed of trust, it granted and conveyed unto this respondent as trustee certain real and personal property

therein described as security for bonds to be issued thereunder.

In order further to secure said bonds of the railway company, and thus induce the purchase thereof by third parties, The Buckeye Coal & Railway Company, pursuant to due corporate action, joined in the execution of said mortgage, and duly delivered the same, and among other things granted and conveyed to this respondent as such trustee, said real estate, lands and tenements formerly of The Hocking Coal and Railroad Company therein described; and in order to give added security to said bonds, and to make them more readily saleable, various covenants were made by the grantors in said first consolidated mortgage, and among other such covenants said mortgage contains the following in Article 2 thereof, the petitioner Buckeye Company being therein described as the Coal Company, and this respondent as the Trustee:

"Sec. 9. On July 1st, 1900, and on or before July 1st in each and every year thereafter, the Coal Company shall deliver to the Trustee a statement in writing showing the amount of coal mined from the lands owned by the Coal Company, and mortgaged hereunder, during the year ending with the 1st day of March next preceding the date of such statement, and simultaneously it shall pay to the Trustee hereunder a sum equal to two cents per ton on all coal so mined during such preceding year.

"All sums so received by the Trustee shall by it be used and applied in purchasing bonds hereby secured, in such manner as to it shall seem best, and at such prices as it shall deem best, not exceeding the rate of one hundred and five per centum and accrued interest. All such bonds when so purchased shall be cancelled. All sums so received by the Trustee and not by it so used within six months from its receipt thereof, shall be returned to the Coal Company."

Said mortgage likewise contains various and sundry other covenants to be performed by the mortgagors; and respondent prays leave to produce at the trial hereof said original mortgage, or a copy thereof, for the purpose of showing to the court the properties conveyed by said grantors therein, and the covenants severally made by them, and of advising the court of the full text and tenor

of such grants and covenants and the other terms and provisions of said mortgage.

The facts are that said mortgage was executed and delivered containing the covenants aforesaid, in the circumstances and upon the considerations aforesaid, and in the circumstances and upon the considerations stated in said mortgage, wherein among other things it is recited, The Buckeye Coal & Railway Company being sometimes referred to as the Coal Company and this respondent as the Trustee, that

"The Buckeye Coal and Railway Company, the party of the second part hereto, did acquire all of its real estate, lands and tenements hereinafter described and conveyed, by and under a deed thereof made and delivered the twenty-fifth day of February, 1899, whereby and whereunder said The Buckeye Coal and Railway Company was required, and did agree, in consideration of such transfer, to join in this mortgage and to grant and convey the said real estate, lands and tenements to the Trustee, upon the terms and conditions of this mortgage, for the further security of the said bonds issued and to be issued hereunder by the Railway Company;" and that

"At a meeting of the holders of all of the capital stock of the Coal Company, duly called and held at its office at Columbus, Ohio, on the twenty-fifth day of February, 1899, resolutions were duly adopted by the affirmative vote of the holders of all of the capital stock of the Coal Company, consenting to and approving of the execution of an indenture substantially in the form of these presents, as additional security for the bonds of the Railway Company hereby secured, for an aggregate principal sum not exceeding \$20,000,000;" and that

"The Board of Directors of the Coal Company, at a meeting thereof duly held the twenty-fifth day of February, 1899, duly adopted resolutions in the following words, that is to say:

Resolved, that the president and secretaary of the company be, and hereby they are authorized and directed, in its behalf and under the corporate seal, to execute and to deliver to Central Trust Company of New York as trustee, a mortgage or deed of trust to be known as the first consolidated Mortgage, substantially of the tenor of the draft thereof now submitted at this meeting, upon

all of the real estate, lands and tenements of this company heretofore acquired by this company from Melville E. Ingalls, Jr., and George H. Gardiner, upon the express condition, and in consideration of the agreement of this company to grant and convey the said real estate, lands and tenements to Central Trust Company of New York, as trustee, upon the terms and conditions set forth in the said mortgage, and as additional security for bonds issued and to be issued thereunder for an aggregate principal sum not exceeding twenty million dollars (\$20,000,000), such mortgage to be executed and to be delivered jointly by this company and The Hocking Valley Railway Company."

And that,

"This indenture is substantially of the tenor of the draft thereof submitted to and approved by the stockholders of the Railway Company and also by the stockholders of the Coal Company at their said meetings, and submitted to and approved by the Board of Directors of the Railway Company and also by the Board of Directors of the Coal Company at their said meetings;" and further:

"And the Coal Company, the party of the second part, in consideration of the premises, and of the purchase and acceptance of such bonds by the holders thereof, and of the sum of one dollar to it by the trustee duly paid, at or before the enrolling and delivery of these presents, the receipt whereof hereby is acknowledged, has executed and delivered these presents, and has granted, bargained, sold, aliened, remised, released, conveyed, confirmed, assigned, transferred and set over, and by these presents does grant, bargain, sell, alien, remise, release, convey, confirm, assign, transfer and set over unto the Trustee, the party of the third part, its successors and assigns forever:

"All and singular the real estate, lands and tenements formerly of The Hocking Coal and Railroad Company," and so forth, describing the lands in question.

And respondent pleads that petitioners herein are estopped from denying the recitals of said mortgage.

Said mortgage further provided, in Article 1 thereof, that all bonds to be secured thereby, from time to time, should be executed, and should be delivered by said rail-

way company to said trustee for certification, and thereupon, as provided in said article, the trustee should certify and deliver the same; and that only such bonds as should bear thereon such certificate should be secured by said indenture or entitled to any lien or benefit thereunder; and that every such certificate of said trustee, upon any bond executed in behalf of said railway company, should be conclusive evidence that the bond so certified was duly issued under said mortgage, and is entitled to the benefit thereof. Subsequently to the execution and delivery of said mortgage or deed of trust as aforesaid, and prior to the filing of the bill in this suit, the respondent as such trustee, did in conformity with the terms of said mortgage duly certify \$16,156,000 face value of bonds executed and delivered by and in behalf of said railway company, in conformity with the terms of said mortgage, payable to bearer and intended for general circulation, and thereupon each and all of said bonds so certified were duly delivered pursuant to the terms of said mortgage, and all of said bonds as this respondent is informed and believes were duly issued; and of said bonds so issued \$16,022,000 face value are now outstanding in the hands of numerous bonafide holders for value, and are entitled to the full benefit and security of said mortgage.

Said mortgage was forthwith filed for record and recorded in each of the counties wherein the real and personal property therein described was and is situated or employed, including the counties hereinafter specifically named; and was delivered to the recorder of said Hocking county for record and filed for record in the office of said recorder on March 4, 1899, and duly recorded in the mortgage records of said office in volume 21 at pages 3 to 67 inclusive; and was delivered to the recorder of said Perry county for record and filed for record in the office of said recorder on March 18, 1899, and duly recorded in the mortgage records of said office in volume 5 at pages 129 to 180 inclusive; and was delivered to the recorder of said Athens county for record and filed for record in the office of said recorder on March 20, 1899, and duly recorded in the mortgage records of said office in volume 33 at pages 1 to 51 inclusive.

4. It admits the allegations of paragraph 5 of the pe-

tition; and refers to and adopts what it has already said with respect thereto in paragraph 3 of this answer.

5. It admits that on October 9, 1915, the complainant United States of America filed a petition in this cause asking for an order that The Hocking Valley Railway Company be required to sell stocks and bonds of certain coal companies (including the stock of said Buckeye company) which were pledged under said mortgage; and that the respondent as trustee filed its answer thereto October 22, and said Hocking company filed its answer thereto October 23, 1915; but the respondent denies that the Hocking company then continued to retain and own said stock and bonds contrary to said decree; and refers to said proceedings and the adjudication thereof and to what is hereinafter said on that subject for an exact statement of the situation with respect thereto.

6. In regard to the allegations of paragraph 7 of the present petition, the respondent refers to its said answer to said petition of the United States, for a true statement of its contents.

7. It admits that the matter quoted in paragraph 8 of the petition is contained in a foot note to said order of May 19, 1919, and refers to said order in the foot notes thereto of record in this cause for their true import and effect.

8. It admits it appealed from said order of May 19, 1916, and in the following November dismissed said appeal; and admits that on or about November 10, 1916, the stock of said Buckeye company was sold to John S. Jones in conformity with said order of sale and with an order approving said sale of date October 7, 1916, entered in this cause November 10, 1916; and further says:

Said Jones or he and others represented by him in said purchase have ever since been and now are the real or beneficial owners of all said stock, and will be the sole beneficiaries of any order or decree herein in favor of the petitioners. Said sale was made by and pursuant to a written contract dated October 7, 1916, by and between The Hocking Valley Railway Company, of the first part, The Chesapeake and Ohio Railway Company, of the second part, and John S. Jones, of the third part.

In and by said contract, it was recited and agreed by and between said parties, as essential terms thereof, that

The Buckeye Coal and Railway Company is a corporation under the laws of Ohio with an authorized capital stock of \$250,000, divided into 2500 shares of the par value of \$100 each, all of which was then outstanding; that The Hocking Valley Railway Company theretofore acquired all said outstanding capital stock and duly pledged and deposited the same, (except five shares held by directors thereof), under said first consolidated mortgage, made by The Hocking Valley Railway Company and the Buckeye Coal and Railway Company to Central Trust Company of New York, trustee, securing an authorized issue of \$20,000,000 of first consolidated mortgage $4\frac{1}{2}\%$ gold bonds of The Hocking Valley Railway Company, and that said stock was then deposited with and held by said trustee under said mortgage; that under date of April 30, 1908, The Hocking Valley Railway Company entered into a trust agreement with said Central Trust Company of New York, as trustee, whereby all said stock was, subject to the lien of said first consolidated mortgage, conveyed to said Trust Company, in trust to dispose of the equity in said stock, subject to the lien of said mortgage and the rights of said trustees thereunder, when and as directed in writing by the holders or owners of record of a majority in amount of the stock of The Hocking Valley Railway Company; that The Chesapeake and Ohio Railway Company then owned more than a majority of the stock of The Hocking Valley Railway Company, and was therefore entitled under said trust agreement last mentioned to give directions for the disposal of said equity in said stock; that by said mortgage, The Buckeye Coal and Railway Company conveyed certain real estate in said mortgage described, as further security for the payment of said mortgage bonds, and among other things, agreed to pay the said trustee thereunder, a sum equal to 2c a ton on all coal mined from the property of The Buckeye Coal and Railway Company so mortgaged, to be applied in purchasing bonds secured by said mortgage; and that The Hocking Valley Railway Company and The Chesapeake and Ohio Railway Company desired to procure the release of said stock of The Buckeye Coal and Railway Company from the lien of said first consolidated mortgage, and desired to effect the sale

thereof, and said John S. Jones desired to purchase the same, upon the terms and conditions in said contract.

And thereupon, and in consideration of the premises so recited, it was agreed by and between said parties that The Hocking Valley Railway Company should forthwith make due application to said trustee under said mortgage to release from the lien thereof said stock of The Buckeye Coal and Railway Company, in accordance with the provisions of said mortgage; that The Chesapeake and Ohio Railway Company, as owner of more than a majority of the outstanding stock of The Hocking Valley Railway Company, should take due action to procure the sale by The Hocking Valley Railway Company and by said trustee under said trust agreement of April 30, 1908, of said stock of The Buckeye Coal and Railway Company, and that the action so provided for having been taken and said stock delivered to said Jones, together with resignations of all officers and directors requested by him, said Jones would pay simultaneously with such delivery, to this respondent as trustee, in cash, in respect of said stock of The Buckeye Coal and Railway Company the sum of \$50,000, said stock to be delivered to said Jones endorsed in blank for transfer.

Said stock of The Buckeye Coal and Railway Company, agreed to be sold as aforesaid, was so sold for said price of \$50,000, in consideration of the facts so recited that said property was encumbered as aforesaid, an abatement being made on that account in the price that otherwise said stock would have sold for, as without said encumbrance of said property said stock would have been of much greater value; all of which said Jones then well knew.

And in further consideration of said sale to him as aforesaid, said Jones in and by said contract further agreed that he thereby waived and released any and all claim of every character against The Hocking Valley Railway Company, The Chesapeake and Ohio Railway Company, or this respondent, by reason of any liability or claim which might be asserted by said The Buckeye Coal and Railway Company by reason of any matter or thing in connection with the ownership of said stock or the management of said company from the organization

thereof to the date of the delivery of said stock under said agreement.

And The Hocking Valley Railway Company and The Chesapeake and Ohio Railway Company, in and by said contract, did waive and release any and all claims of every character and description against said The Buckeye Coal and Railway Company and said purchaser, or either of them, by reason of any liability or claim which might be asserted by The Hocking Valley Railway Company, The Chesapeake and Ohio Railway Company, or either of them, against The Buckeye Coal and Railway Company, by reason of any matter or thing whatsoever occurring to the date of said agreement; except, it was therein provided, that nothing contained in said agreement was intended or should be construed in any wise to limit or affect or impair the several covenants or obligations of The Buckeye Coal and Railway Company contained in said first consolidated mortgage.

And it was further agreed in and by said contract that if The Hocking Valley Railway Company should at any time default in the payments or obligations imposed on it by said consolidated mortgage, and said mortgage should be enforced or foreclosed in any way or to any extent, The Hocking Valley Railway Company would cause all the property of The Hocking Valley Railway Company to be first exhausted before any recourse is had under said mortgage to the property of The Buckeye Coal and Railway Company and would indemnify and save and hold harmless said The Buckeye Coal and Railway Company from any loss or damage to or payment of said The Buckeye Coal and Railway Company, under the provisions of said mortgage, save only said 2c a ton above mentioned.

And said parties to said contract therein mutually agreed that said contract should inure to the benefit of and be binding upon the parties thereto, and their respective successors and assigns.

Said order in this suit of May 19, 1916, to comply with which said sale was negotiated by The Hocking Valley Railway Company, required that said contract should be, and it was expressly made, subject to the approval of this court; and in pursuance of that requirement, the parties to said contract appeared in this suit for that

purpose, and duly submitted said contract to this court and thereupon, by its order of October 7, 1916, this court found that said purchaser was satisfactory to the court, and that said sale complied with said order entered May 19, 1916, and that the terms of said contract of sale were, and the amount of cash paid for said stock was, such as to fully protect the interests of this respondent as such trustee, and that the price proposed to be paid for said stock was the reasonable value thereof, and thereupon it ordered that said sale and the terms thereof as embodied in said contract be, and the same thereby were, approved, and that this respondent as such trustee, upon due application to it in accordance with the terms of said first consolidated mortgage, as provided in said contract, release said stock from the lien of said mortgage upon the payment to it of the purchase price thereof; which said order was duly entered in said cause November 10, 1916, upon the dismissal of an appeal taken by this respondent from said order of May 19, 1916, and thereupon on or about said November 10, 1916, said sale was consummated in accordance with the terms and conditions of said contract.

This respondent further pleads that the petitioners herein, and those beneficially interested in them as aforesaid, by reason of the premises, are estopped from denying the validity of said mortgage and the covenants of The Buckeye Coal and Railway Company therein contained.

9. It admits that by said Section 9, the respondent has a valuable interest in the coal lands of said Buckeye Company, according to the tenor and effect of said section and said mortgage; denies that the same is contrary to the letter or spirit of the decree of March 14, 1914; admits that some of the mines of said Buckeye Company are located on the railroad of The Hocking Valley Railway Company; but denies that said provision for the payment to this respondent as trustee of said 2c a ton is any inducement to the railway company to furnish better service to said mines than to other mines situated on its railroad.

10. It denies that the covenant of said Section 9 is unusual in such mortgages; admits that it is signed by a coal company, upon the considerations herein recited,

in order as aforesaid to further secure bonds issued by a railroad company; admits that under the provisions of said mortgage all the coal lands of said Buckeye Company are now mortgaged to secure said railway company's bonds; but denies that said mortgage or covenant is invalid or appears so to be.

11. It admits that in January, 1919, this respondent brought suit in this court, No. 110, on the equity side thereof, against The Buckeye Coal and Railway Company to collect from it said 2c a ton on coal mined since March 1, 1916, which suit is still undisposed of, and that said The Buckeye Company is resisting the same. It also admits that the Court of Appeals for Perry county, Ohio, March 4, 1921, in the suit hereinafter more particularly mentioned, and over the contention of the petitioners herein, decided that said Section 9 of Article 2 of said mortgage is valid. And further in respect of said suits, this respondent says:

12. On or about April 17, 1919, said John S. Jones, having theretofore acquired as aforesaid all the capital stock and securities of The Buckeye Coal and Railway Company and of two other corporations known respectively as Sunday Creek Coal Company of New Jersey and The Ohio Land and Railway Company, in order to bring about a consolidation of the properties of said companies under one corporation, caused The Sunday Creek Coal Company aforesaid to be incorporated under the laws of Ohio, and on or about May 1, 1919, in order to effect such consolidation, caused each of said three corporations in this paragraph first named to convey, and they each did convey, all of their respective properties to said The Sunday Creek Coal Company for a nominal consideration, in consideration of the fact that the latter company exchanged with said John S. Jones all its capital stock for said stock and securities of said three other companies; which conveyance of The Buckeye Coal and Railway Company included the lands owned by that company and mortgaged under said first consolidated mortgage, said lands being situate in the counties of Hocking, Perry and Athens in the state of Ohio.

13. Among the covenants and provisions of said first consolidated mortgage the following are made and provided in Article 10 thereof, The Hocking Valley Railway

Company being therein referred to as the Railway Company and The Buckeye Coal and Railway Company as the Coal Company:

"Section 1. All the covenants, stipulations, premises and agreements in this indenture contained, by or in behalf of the Railway Company or of the Coal Company, severally and respectively, shall bind such company, its successors and assigns, whether so expressed or not.

Sec. 2. Nothing contained in this indenture or in any bond hereby secured, shall prevent any consolidation, or merger of the Railway Company or of the Coal Company with each other or with any other corporation or any conveyance and transfer, subject to the continuing lien of this indenture and to all the provisions hereof, of all the mortgaged and pledged premises as an entirety to a railroad corporation at that time existing under and by virtue of the laws of any state or states, and entitled to acquire the same; provided, however, that such consolidation, merger or sale shall not impair the lien and security of this indenture, or any of the rights or powers of the trustee, or of the bondholders hereunder, and that upon such consolidation, merger or sale, the due and punctual payment of the principal and interest of all of the said bonds according to their tenor, and the due and punctual performance and observance of all the covenants and conditions of this indenture, shall be assumed by the corporation formed by such consolidation or merger, or purchasing as aforesaid."

14. From and after March 1, 1916, The Buckeye Coal and Railway Company continued to own said lands referred to in Section 9 of Article 2 of said mortgage, and to mine or cause to be mined coal therefrom, up to the time of its said conveyance of May 1, 1919; and thereafter The Sunday Creek Coal Company, as its successor and assign as aforesaid, continued to own said lands, and to mine or cause to be mined coal therefrom up to the present time, and is continuing so to do; yet said petitioners, and each of them, have failed and refused to deliver to the respondent the statements required by Section 9, and also have failed and refused to pay to this respondent a sum equal to 2c a ton on all coal mined from said lands, for the years ended March 1, 1917, March 1, 1918, March

1, 1919, March 1, 1920, and March 1, 1921, or any part thereof.

15. On or about April 21, 1919, said The Buckeye Coal and Railway Company, as plaintiff, commenced a civil action against this respondent and The Hocking Valley Railway Company, as defendants, in the Court of Common Pleas of said county of Perry, to quiet its title to said lands, being case No. 5895 in said court. On or about November 12, 1919, The Sunday Creek Coal Company had itself made a party plaintiff to said action, and thereafter participated as such a plaintiff in the litigation. In said cause, and upon the pleadings therein, there was an issue between the parties as to the validity of said mortgage and covenants, including the matters and things now set up in respect thereof in the petition of the petitioners herein, and upon the trial thereof, the Court of Common Pleas by its judgment upon the merits duly given and entered on or about January 8, 1920, found and adjudged the same against the plaintiffs therein and in favor of the defendants therein, sustaining the validity of said mortgage and covenants.

Thereupon, the plaintiffs in said action appealed said cause to the Court of Appeals for said county, being case No. 70 in that court, and at the trial of said cause upon appeal, upon the same issues, said Court of Appeals by its judgment upon the merits duly given and entered on or about March 4, 1921, found and adjudged the same in favor of the defendants therein and against the plaintiffs therein, and did order, adjudge and decree that said first consolidated mortgage and the covenants of The Buckeye Coal and Railway Company therein contained are valid and binding obligations, and a good and valid lien upon the real property in said mortgage described, and that the petition of the plaintiffs therein be and the same was dismissed upon the merits, with costs; and the plaintiffs therein having thereupon filed a motion for a new trial, said Court of Appeals, on consideration thereof, overruled said motion; to all of which the plaintiffs therein did except and take their bill of exceptions thereto.

Thereafter on or about May 5, 1921, the plaintiffs in said cause, filed their motion in the Supreme Court of Ohio, which was given case No. 17047 in that court, for an order directing said Court of Appeals to certify the

record in said cause to the Supreme Court for review; on consideration whereof, said court on or about June 7, 1921, overruled said motion; and said judgment and proceedings of said Court of Appeals are in full force and unreversed and are res adjudicata and conclusive upon the parties to said suit as to the validity of the mortgage and the covenants aforesaid, and the petitioners herein, and each of them, are and ought to be estopped from denying the validity thereof.

Wherefore, respondent prays that said petition may be dismissed, for costs and all proper relief.

Central Union Trust Company of New York,

By Larkin, Rathbone & Perry,

Its solicitors.

Arthur H. Van Brunt,
Of counsel.

REPLY OF THE BUCKEYE COAL & RAILWAY COMPANY AND THE SUNDAY CREEK COAL COMPANY TO THE ANSWERS OF THE CENTRAL UNION TRUST COMPANY AND THE HOCKING VALLEY RAILWAY COMPANY FILED IN JANUARY, 1922, TO THE PETITION OF THESE REPLIANTS.

[Filed March 21, 1922.]

The Buckeye Coal and Railway Company and The Sunday Creek Coal Company, petitioners, for reply to the answers of the Central Union Trust Company and The Hocking Valley Railway Company to said petition, say:

1. They deny the statements of paragraphs 2 in said answers as to the scope and effect of the decree entered in this cause on March 14, 1914, and of the supplemental orders of record herein, upon the rights of said two respondents, and upon said first consolidated mortgage and the covenants thereof, and refer to said decree and orders for the proper construction thereof.

2. They deny the conclusions contained in paragraphs 3 of said answers concerning the effect of said suit of Central Trust Company of New York against the Columbus, Hocking Valley and Toledo Railway Company, et al., reported in 87 Fed. Rep. 815, and for all

the matters and things determined in said cause and for the facts then before the court and the positions taken by the several parties, refer to the opinion in said cause.

3. They deny that the matter contained in Section 9 of said mortgage, quoted in paragraphs 3 of said answers, was necessary or proper to be agreed to by said Buckeye Coal & Railway Company, and state that the provisions for said two cent royalty per ton were not contained in the contract executed on February 25, 1899, for the transfer of said properties to said Buckeye Company, or in the deed of the property to it, or in the resolution authorizing the making of said mortgage, and were unauthorizedly inserted in said mortgage. Petitioners attach hereto, as exhibits 1, 2, and 3, copies of said original contract of purchase by the Buckeye Coal & Railway Company, of the deed of said properties (excepting the description thereof) to said Buckeye Company, and of the original resolutions of the Buckeye Company providing for its joining in said mortgage, and are ready to produce in court the originals of said documents.

4. For the contents of said mortgage and all its recitals reference is hereby made to the said original mortgage or a true copy thereof, and petitioners deny that the true effect or meaning of said mortgage or the conclusions to be drawn therefrom or the facts, circumstances or reasons for the Buckeye Coal & Railway Company becoming a party thereto are correctly set forth in said answers.

5. Petitioners also deny that the true interpretation or effect of the contract dated October 7, 1916, between the Hocking Valley Railway Company and Chesapeake & Ohio Railway Company and John S. Jones are correctly set forth in paragraphs 8 of said answers, and attach to this reply a true copy of said contract, as Exhibit 4, and refer to it for the terms and proper interpretation thereof. Petitioners deny, that, as stated in paragraphs 8 of said answers, the capital stock of said Buckeye Company was sold for \$50,000 because of said Hocking Railway Company general mortgage, and, on the contrary, state that one of the principal reasons for the low price for which said stock was sold that all the lands of said Buckeye Company were then under a

long-time lease to the Sunday Creek Company of New Jersey at a low royalty and without any requirements for minimum production. They specifically deny, that, as alleged in said answers, the petitioners herein are estopped from denying the validity of said mortgage and of the covenants of said Buckeye Company therein contained.

6. Petitioners deny the allegations contained in paragraphs 12 of said answers that said Jones caused said Buckeye Company, Ohio Land & Railway Company and The Sunday Creek Company of New Jersey to convey all their respective properties to said newly organized Sunday Creek Coal Company for a nominal consideration, and, on the contrary, aver that said Jones sold, delivered and transferred to said Sunday Creek Coal Company of Ohio all of the stocks and bonds which he held of said three companies, and received in exchange therefor an equal amount in dollars of the capital stock of said newly organized company, and that thereafter said newly organized company, in its own way and at its own pleasure, caused the properties of said three companies, all of whose stock and securities it then owned, to be conveyed to said newly organized company, and that every transaction between said Jones and any of said companies was for a fair and adequate consideration.

7. Petitioners aver that the proceedings mentioned in paragraphs 15 of said answers were not decided in a case in which any person representing the public, either state or federal, was present or involved; that no questions of public policy were considered and that the cases were so decided simply, solely and technically upon the ground that the Buckeye Coal & Railway Company had actually and physically executed the \$20,000,000 mortgage made by the Hocking Valley Railway Company, thereby pledging its lands as additional security to said bonds; and that such decision is not res adjudicata in this cause, wherein matters of public policy are involved and in which the main decree was entered about for or five years before the proceedings set up in said paragraphs 15 were begun and carried on, and that such proceedings cannot, therefore, have any controlling effect upon the propriety and effect of

said principal decree entered in this cause or of what should be done in this case upon the present petition.

8. Believing that the provision contained in said general railway mortgage for the payment of said two cents royalty to apply on said sinking fund was void, and that such payment could not be enforced because it was the result of the railway company holding an interest in coal lands contrary to the decree in this case of March 14, 1914, the said Buckeye Company as soon as it came into hands independent of the railway company and the said, The Sunday Creek Coal Company, of Ohio, as soon as it acquired the lands and properties of said Buckeye Company, that is, since about November, 1916, refused and has ever since steadily refused to recognize the validity of said two cents per ton provision and has likewise refused to make any payment under said provision. Your petitioners did not think that under said provision the trust company or the railway company, defendants herein, had any valid claim to the royalty of two cents per ton or that it was necessary to submit the matter to this court for disposition. It was only when the courts of Perry County decided as is set forth in the answers to the petition under consideration and in this reply, that it became necessary, in your petitioners' judgment, to submit the matter to this court for its action, and they thereupon promptly so submitted it.

The Buckeye Coal & Railway Company, and

The Sunday Creek Coal Company,

By Wm. Burry, W. O. Henderson, the Solicitors.

EXHIBIT NO. 1.

Purchasers—Buckeye Agreement.

This Agreement, Made this 25th day of February, in the year eighteen hundred and ninety-nine, by and between

The Buckeye Coal and Railway Company, a corporation organized and existing under the laws of the State of Ohio (hereinafter called the Company), party of the first part and Melville E. Ingalls, Jr., and George H. Gardiner (hereinafter called the Purchasers), parties of the second part:

Whereas, The Parties of the second part were the purchasers of certain real estate, lands and tenements of The Hocking Coal and Railway Company, at the foreclosure sale thereof on the 24th day of February, 1899, under and in pursuance of the judgment and decree of the Circuit Court of the United States for the Southern District of Ohio, Eastern Division, and under the certain deeds of conveyance thereof, made and executed by Benjamin R. Cowen and Andrew R. Humes, as Special Master Commissioners, and others; and

Whereas, The Parties of the second part this day have tendered and delivered to the Company, the party of the first part, a deed of conveyance of the said real estate, lands and tenements formerly of The Hocking Coal and Railway Company, which deed of conveyance is delivered to and accepted by the party of the first part upon the express condition and agreement that it will enter into and will execute, with the parties of the second part, the covenants and conditions of this agreement:

Now, Therefore, In consideration of the premises and of the mutual promises and agreements hereinafter contained, the said parties hereby do promise and agree as follows:

First. When and as requested by the Purchasers or by the assigns (either individual or corporate), by them from time to time designated, the Company will make, execute, and deliver, or will join with the Purchasers or their assigns in making, executing and delivering, a mortgage or deed of trust, granting, conveying and pledging said real estate, lands and tenements, and the rents, issues and profits thereof, as security for the payment of the bonds issued or to be issued by the purchasers or their assigns for the aggregate principal sum of twenty million dollars (\$20,000,000), bearing interest at the rate of four and one-half per cent. per annum, payable semi-annually, both principal and interest being payable in gold coin of the United States of the present standard of weight and fineness, and the principal to be payable on the first day of July, 1999.

Second. From time to time, and whenever thereunto requested by the Purchasers or their assigns, the Company, will grant, pledge and convey, under such mort-

gage or any mortgage to be given in further assurance thereof, and as full security for the bonds above issued or proposed to be issued by the Purchasers or their assigns, all of the property and franchises of the Company of every name and nature.

Third. In case any property or assets of the Company, not derived or received from the Purchasers or their assigns, without further consideration therefor, shall be used or taken from the payment or discharge of any obligation of any kind under the said bonds or mortgage of the Purchasers or their assigns, the Company, to the extent of such payment or proportion of its property so used or taken (other than property so derived from the Purchasers or their assigns, without further consideration therefor) shall have and may assert a claim for the amount of such property so taken against the party joining with the Company in the execution of the mortgage, securing the said bonds; it being distinctly understood and agreed that the Company assumes no obligation in respect of any such bonds or the payment thereof, other than to pledge and mortgage, as security therefor, all property received by the Company from the Purchasers or their assigns, or according to the terms of any instrument making or conveying such property.

Fourth. The Company hereby assumes and will pay, as a part consideration for this conveyance, all the lawful indebtedness of the Receiver of The Hocking Coal and Railroad Company; will carry out and fully perform all the provisions and conditions of said decree of foreclosure; of said Special Master's deed to the Purchasers; and of the decree of said Court confirming said sale, and all orders of said Court hereafter entered saving the Purchasers free and harmless from any and all liability in the premises: but the discharge and satisfaction of such indebtedness and conditions by The Hocking Valley Railway Company shall inure to the benefit of, and in reduction of the obligations of, the Coal Company.

In Witness Whereof The Parties hereto have caused these presents to be executed the day and year first above written.

The Buckeye Coal and Railway Company.

(L. S.) By (Signed) James H. Hoyt,
President.

Attest:

Gustav von den Steinen, Secretary.

Melville E. Ingalls, Jr. (L. S.)

George H. Gardiner, (L. S.)

EXHIBIT NO. 2.

Deed From Purchasers to Buckeye Company

This Indenture, Made this twenty-fifth day of February, in the year eighteen hundred and ninety-nine, between Melville E. Ingalls, Jr., and George H. Gardiner (hereinafter called the Purchasers), parties of the first part; and

The Buckeye Coal and Railway Company, a corporation of the State of Ohio (hereinafter called the Company), party of the second part:

Whereas, The parties of the first part, were the Purchasers of certain real estate, lands and tenements of The Hocking Coal and Railway Company, at the foreclosure sale thereof on the 24th day of February, 1899, under and in pursuance of a certain judgment and decree of the Circuit Court of the United States for the Southern District of Ohio, Eastern Division, wherein Central Trust Company of New York was complainant and The Columbus, Hocking Valley and Toledo Railway Company and others were defendants, and under certain deeds of conveyance thereof made, executed and delivered February 24, 1899, under and in pursuance of the decree of said Circuit Court confirming said sale, made and entered February 24, 1899; and

Whereas, It is the desire and intention of the parties hereby to vest in, and to transfer to, the party of the second part, the titles to the several properties hereinafter described:

Now, Therefore, In consideration of the premises and of one dollar to them in hand paid by the party of the second part, and of certain other valuable considerations set forth in a written proposition and a certain agreement this day made, accepted and entered into, the receipt whereof here is acknowledged by the parties of the first

part, and of the covenants and agreements of the party of the second part hereinafter set forth, the parties of the first part hereby do grant, bargain, sell, assign, transfer, set over and convey, to the party of the second part, its successors and assigns, forever:

All and Singular the real estate, lands and tenements formerly of The Hocking Coal and Railway Company, which, upon said foreclosure sale, were purchased as aforesaid by the parties of the first part, and which are more particularly described as follows, to-wit:

(Here follows description of property.)

Together with all income, proceeds of income, bills and accounts receivable, cash and other property, received by the Receiver of said The Hocking Coal and Railway Company, in the management or operation of the said premises or pertaining thereto, and also any and all property acquired for use in connection with, or for the purposes of said property, invested in, or standing in the name of, the said Receiver, or to which in any manner the said Receiver has acquired title.

To Have and to Hold all and singular the property hereby conveyed.

But Subject, Nevertheless, to the lien and charge, in favor of the parties of the first part, of the due performance by the party of the second part of the following covenants and undertakings, the same constituting the principal consideration for this conveyance; that is to say:

First. When, and as requested by the Purchasers or their assigns (either individual or corporate), by them from time to time designated, the Company will make, execute and deliver, or will join with the Purchasers or their assigns in making, executing and delivering a mortgage or deed of trust, granting, conveying and pledging said real estate, lands and tenements, and the rents, income issues and profits thereof, as security for the payment of the bonds issued or to be issued by the Purchasers or their assigns for the aggregate principal sum of twenty million dollars (\$20,000,000), bearing interest at the rate of four and one-half per cent per annum, payable semi-annually, the principal and interest being payable in gold coin of the United States of the present standard of weight

and fineness, and the principal to be payable on the first day of July, 1999.

Second. From time to time, and wherever thereunto requested by the Purchasers or their assigns, the Company will grant, pledge and convey under such mortgage or any mortgage to be given in further assurance thereof and as full security for the bonds above issued or proposed to be issued by the Purchasers or their assigns, all of the property and franchises of the Company of every name and nature.

Third. In case any property or assets of the Company, not derived or received from the Purchasers or their assigns, without further consideration therefor, shall be used or be taken for the payment or discharge of any obligation of any kind under the said bonds or mortgage of the Purchasers, the Company to the extent of such payment or proportion of its property so used or taken (other than property so derived from the Purchasers or their assigns, without further consideration therefor), shall have and may assert a claim for the amount of such property so taken against the party joining with the Company in the execution of the mortgage securing the said bonds; it being distinctly understood and agreed that the Company assumes no obligation in respect of any such bonds or the payment thereof, other than to pledge and mortgage, as security therefor, all property received by the Company from the Purchasers or their assigns, or according to the terms of any instrument making or conveying such property.

Fourth. The Company hereby assumes and will pay, as part consideration for this conveyance, all the lawful indebtedness of the Receiver of The Hocking Coal and Railroad Company; will carry out and fully perform all the provisions and conditions of said decree of foreclosure; of said Special Master's deed to the Purchasers; and of the decree of said Court confirming said sale, and all orders of said Court hereafter entered saving the Purchasers free and harmless from any and all liability in the premises; but the discharge and satisfaction of such indebtedness and conditions by The Hocking Valley Railway Company shall inure to the benefit of, and in reduction of, the obligation of the Coal Company.

In Witness Whereof, The Parties hereunto have set

their hands and seals the day and year first above written, and the party of the second part has caused these presents to be signed by its officers duly authorized, and its corporate seal to be affixed hereunto and to be attested by its Secretary, the day and year first above written.

(Signed) Melville E. Ingalls, Jr. (L. S.)
George H. Gardiner (L. S.)

Signed, sealed, acknowledged and delivered in the presence of

Francis Lynde Stetson,
Arthur Heyde, Attesting Witnesses.

The Buckeye Coal and Railway Company,
By (Signed) James H. Hoyt, President.

Attest:

Gustav von den Steinen (L. S.) Secretary.

Signed, sealed, acknowledged and delivered in the presence of:

Francis Lynde Stetson,
Arthur Heyde, Attesting Witnesses.

State of Ohio, Franklin county, ss:

Be it remembered that on this 25th day of February, 1899, before me, a notary public in and for said county, personally appeared Melville E. Ingalls, Jr., and George H. Gardiner, to me known, and known to be the individuals described in and who executed the foregoing conveyance, and severally acknowledged to me that they executed the same as their voluntary act and deed, and desire the same to be recorded as such.

Arthur Heyde, Notary Public.

I. R. stamps (10c) Cancelled.

L. S.

State of Ohio, Franklin county, ss:

I, Chas. F. Galloway, a Clerk of the Court of Common Pleas, a Court of Record of Franklin county aforesaid, do hereby certify that Arthur Heyde, before whom the annexed acknowledgment was taken was, at the date thereof, a Notary Public in and for said county, duly authorized by the laws of Ohio to take the same; that I am well acquainted with his handwriting and believe the signature thereto is genuine, and that the annexed instrument is executed according to the laws of Ohio.

In Testimony Whereof, I have hereunto subscribed

my name and affixed the seal of said Court at Columbus this 25th day of February, 1899.

(Seal)

Chas. F. Galloway, Clerk.

I. R. stamps (10c) Cancelled.

State of Ohio, Franklin county, ss:

Be It Remembered, that on this 25th day of February, A. D., 1899, before me, the undersigned, a Notary Public in and for the said county, personally came The Buckeye Coal and Railway Company, the grantee of the within deed, by James H. Hoyt, its President and Gustav von den Steinen, its Secretary to me personally known, and known to me respectively to be such President and Secretary, and duly acknowledged the signing of the foregoing instrument to be its voluntary act and deed for the uses and purposes therein mentioned; and the said James H. Hoyt and Gustav von den Steinen being by me duly sworn, did depose and say that they resided, the said James H. Hoyt in Cleveland, Ohio, and the said Gustav von den Steinen, in Cleveland, Ohio; that they are respectively the President and the Secretary of The Buckeye Coal and Railway Company, the corporation described in and which executed the above instrument; that they knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that they signed their names thereto by the like order.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal as Notary Public for the county of Franklin, in the state of Ohio, the day and year last mentioned.

(Seal)

Arthur Heyde, Notary Public.

I. R. stamps (10c) Cancelled.

State of Ohio, Franklin county, ss:

I. Chas. F. Galloway, a Clerk of the Court of Common Pleas, a Court of Record of Franklin county aforesaid, do hereby certify that Arthur Heyde before whom the annexed acknowledgment was taken, at the date thereof, a Notary Public in and for said county, duly authorized by the laws of Ohio to take the same; that I am well acquainted with his handwriting, and believe the signature thereto is genuine, and that the annexed instrument is executed according to the laws of Ohio.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of said Court at Columbus this 25th day of February, 1899.

Chas. F. Galloway, Clerk.

I. R. stamps (10c) Cancelled.

Internal Revenue Stamps (\$750). Cancelled.
(Seal).

EXHIBIT No. 3.

The following proposition from () was then submitted to the meeting to-wit:

Columbus, Ohio, February 25, 1899.

To the Buckeye Coal and Railway Company:

Gentlemen:—On the 24th of February, 1899, Benjamin R. Cowen and Andrew R. Humes, as special master commissioners, duly appointed (and authorized by a decree of foreclosure of the Circuit Court of the United States for the Southern District of Ohio, Eastern Division, entered on May 24, 1898, in the case of the Central Trust Company of New York, complainant, against The Columbus, Hocking Valley and Toledo Railway Company, Knickerbocker Trust Company and others, defendants), sold to the undersigned, in the City of Columbus, County of Franklin and State of Ohio, at public auction, and in accordance with said decree, the following described property to-wit, all and singular the real estate, lands and tenements of The Hocking Coal and Railroad Company, being all of the property mentioned and described in subdivision 2 or paragraph 1 of the said decree, comprising ten thousand and fifteen and fifty one-hundredths (10,015.51) acres of land, and being all of the lands and real estate held or owned by the said The Hocking Coal and Railroad Company in the counties of Hocking, Perry and Athens in the State of Ohio.

We have also purchased certain personal property, consisting of mining equipment, dwelling houses, tools, machinery and appurtenances connected with coal mines formerly operated by The Morris Coal Company at Sand Run and Jobs, Hocking County, Ohio, the same having been purchased by N. Monsurrat, Receiver of The Hocking Coal and Railroad Co., from The Morris Coal Company on March 1, 1898, together with all additions

made thereto since that date; also a certain mining lease covering 536 23-100 acres of land, wherein the New York and Western Coal Company is lessor; this lease is recorded in the Recorder's office of Hocking County, Ohio, in Lease Record, Volume 2, page 203, the same having been duly assigned by said The Morris Coal Company to said Receiver as part of said purchase of March 1st, 1898; also 3,614 fully paid shares of the par value of ten dollars each of the capital stock of The General Hocking Coal Company, an Ohio corporation, together with all undivided profits to which said stock is entitled, as shown on the books of said The General Hocking Coal Company, said stock having been acquired by said Receiver as a part of said purchase from said The Morris Coal Company; also one set of mining engineer's instruments and maps, record and books of the lands and mines; also accounts and bills receivable due the Receiver from his operation of said mines and mining property, amounting to, face value, \$95,353.59; also accounts due the Receiver for rents of dwelling-houses, \$520.96, and any and all others assets and choses in action of the Receiver, subject, however, to the payment of \$228,000 with accrued interest from March 1st, 1898, and subject to any other indebtedness of the Receiver growing out of his receivership and which he may not be able to liquidate by cash which he has on hand; and subject, also, to any further orders which may hereafter be made by said Circuit Court under Section 18 of the said decree of foreclosure.

We now propose to convey to your Company by a quit claim deed the property above and in said decree of foreclosure described, and to convey and transfer, or cause to be conveyed and transferred, to your company by proper assignments and instruments all of the other assets and property specially mentioned herein in consideration of your Company paying to us \$25,000 in cash, and also issuing and delivering to us or our nominees certificates representing 2,250 full-paid shares of the capital stock of your Company, it being understood that as a condition of this purchase your company will assume and agree to carry out and fully perform all the conditions and provisions of said decree of fore-

closure, of said Special Master-Commissioner's deed to us, and also of the decree of said Court confirming said sale, and will assume and agree to pay the indebtedness of said Receiver assumed by us as a condition of said purchase, saving us free and harmless from any and all liability of every nature, kind and description in the premises, and also that your company will fully carry out in all respects a certain plan and agreement for the reorganization of the Columbus, Hocking Valley and Toledo Railroad Company, dated January 4, 1899, to which reference is hereby made; and as a special consideration for said conveyance and transfer that your company will mortgage its said lands and appurtenances hereby agreed to be conveyed to it by us as security for the bonds of The Hocking Railway Company to be issued under said plan.

The acceptance of this proposition by your Company is requested, in which event a formal contract will be submitted for its execution.

Respectfully submitted,

(Signed)

Melville E. Ingalls, Jr.
George H. Gardiner.

After discussion the following resolution, on motion duly seconded, was then unanimously adopted:

Whereas, This company is organized, among other things, for the purpose of mining coal, and the coal lands mentioned in the foregoing proposition made to this company by M. E. Ingalls, Jr., and George H. Gardiner, are valuable mines containing coal of good quality having been already opened thereon, said lands and mines being fitted for the business of this company;

And, Whereas, the other property and assets enumerated in said proposition are valuable and important for this company to acquire in connection with the mines opened and in operation on said coal property.

Now, Be It Resolved, That said proposition be, and the same hereby is accepted in the terms and conditions therein stated, this company hereby assuming the purchase of said property referred to in said proposition, and hereby agreeing to carry out and fully perform all the conditions and provisions contained in said decree of foreclosure said special master commissioner' deed, and in the decree of said court confirming said sale and

any other orders which may hereafter be made by said court in the premises; and also hereby agreeing to assume and pay, as a condition of said purchase, the indebtedness of said Receiver mentioned in said proposition, and hereby agreeing to save said proposers free and harmless from any and all liability, cost and expense of every nature and description whatsoever in the premises.

And, Be It Further Resolved, That the proper officers of the company be, and hereby they are, authorized for and on behalf of the company, in its corporate name and under its corporate seal, to accept said proposition on all of the conditions therein mentioned, such acceptance to be substantially in the form annexed to these resolutions.

And Be It Further Resolved, That, upon the delivery of said proposers to this company of a quit claim deed conveying said real property first above described, and of proper instruments of assignment or conveyance transferring and conveying to this company the other property and assets mention in said proposition, on the conditions in such proposition mentioned, the proper officers of the company be, and hereby are, authorized to issue and deliver to said proposers, or their nominees, 2,250 shares of the capital stock of this company, full-paid and forever non-assessable, and the Treasurer of the company be, and hereby is, authorized to pay to said proposers \$25,000 in cash.

(Form of Acceptance)

Columbus, Ohio, February 25, 1899.

In accordance with a resolution of the board of directors of the undersigned company, unanimously adopted at a meeting of said board, duly held in Columbus, Ohio, on the 25th day of February, 1899, the foregoing proposition is hereby accepted.

The Buckeye Coal and Railway Company,
By (Signed) James H. Hoyt, President.

Attest:

Gustav von den Steinen, Secretary.

The President then submitted to the meeting a proposed form of deed from said purchasers, covering said real property, and also a proposed form of contract to be entered into between this company and said pur-

chasers, binding this company, in accordance with the terms of said proposition, to mortgage its said lands and property as security for the payment of bonds issued or to be issued by the purchasers or their assigns for the aggregate principal sum of twenty million dollars, which deed and contract so submitted to the meeting were in the forms annexed to the minutes of this meeting.

After discussion, on motion duly seconded, the following Resolution was then unanimously adopted:

Resolved, that the deed in the form proposed to be made by the purchasers under their said proposition to this company, conveying the real estate therein described, be and the same hereby is accepted for and on behalf of this company as being in all respects in accordance with said proposition. Be it further resolved, that the proper officers of the company be and they hereby are authorized to execute, on behalf of the company, in its corporate name and under its corporate seal the contract in the form proposed by said purchasers, and in all respects to carry out and to perform all the terms and conditions contained in said proposition and in said deed and contract and in the decrees of said Court, and also to comply with any orders of the Court hereafter entered.

EXHIBIT NO. 4.

Agreement dated the 7th day of October, 1916, between The Hocking Valley Railway Company, hereinafter called the Hocking Company, of the first part, The Chesapeake and Ohio Railway Company, hereinafter called the Chesapeake Company, of the second part, and John S. Jones, hereinafter called the Purchaser, of the third part:

(a) The Ohio Land & Railway Company, hereinafter called the Ohio Company, is a corporation organized under the laws of Ohio with an authorized capital stock of \$2,000,000, divided into 20,000 shares of the par value of \$100 each, of which only 2,006 shares are outstanding. The Ohio Company heretofore duly executed and delivered to the New York Security and Trust Company (now the New York Trust Company), as Trustee, its Twenty-Year Purchase Money Mortgage, dated January

1, 1894, whereby the Ohio company conveyed certain lands and other properties therein described to said Trust Company, as Trustee, to secure an authorized issue of \$1,500,000, of its Twenty-Year Purchase Money Gold Bonds, dated January 1, 1894, maturing January 1, 1914, and bearing interest at the rate of 6% per annum, payable semi-annually. Of said bonds only \$1,312,000 are now outstanding. All said bonds are now past due and bear coupons for the semi-annual interest thereon maturing July 1, 1913, and January 1, 1914, none of which interest has been paid. There are also outstanding and unpaid in the hands of the public four coupons, two of Series No. 7, due July 1, 1897, and two of Series No. 8, due January 1, 1898, respectively from bonds numbered 895 and 896.

(b) The Buckeye Coal & Railway Company, hereinafter called the Buckeye Company, is a corporation organized under the laws of Ohio, with an authorized capital stock of \$250,000, divided into 2500 shares of the par value of \$100 each, all of which is now outstanding.

(c) The Hocking Company heretofore acquired all said outstanding stock and bonds of the Ohio Company, and all said outstanding stock of the Buckeye Company, and thereupon duly pledged and deposited the same (except five shares of stock of each said Companies held by directors thereof) under the First Consolidated Mortgage, dated March 1, 1899, made by the Hocking Company and the Buckeye Company to Central Trust Company of New York, Trustee, securing an authorized issue of \$20,000,000 of First Consolidated Mortgage Four and One-Half Per Cent. Gold Bonds of the Hocking Company, and said stock and bonds are now deposited with and held by said Trustee under said mortgage.

(d) Under date of April 30, 1908, the Hocking Company entered into a trust agreement with said Central Trust Company of New York, as Trustee, whereby all said stocks of the Ohio Company and the Buckeye Company were, subject to the lien of said First Consolidated Mortgage, conveyed to said Trust Company in trust to dispose of the equity in said stocks subject to the lien of said First Consolidated Mortgage, and the rights of said Trustee thereunder, when and as directed in writing by

the holders or owners of record of a majority in amount of the stock of the Hocking Company.

(e) The Chesapeake Company owns more than a majority of the stock of the Hocking Company and is therefore entitled under said trust agreement to give directions for the disposal of said stocks hereinbefore referred to.

(f) By said First Consolidated Mortgage the Buckeye Company conveyed certain real estate in said mortgage described as further security for the payment of said First Consolidated Bonds of the Hocking Company and among other things agreed to pay to said Trustee thereunder a sum equal to two cents per ton on all coal mined from its property so mortgaged, to be applied in purchasing bonds secured by said mortgage.

(g) The Hocking Company and the Chesapeake Company respectively desire to procure the release of said stocks of the Ohio and Buckeye Companies and said bonds of the Ohio Company from the lien of said First Consolidated Mortgage and desire to effect the sale of said bonds and said stocks and the Purchaser desires to purchase the same, all upon the terms and conditions hereinafter provided.

For a valuation consideration it is therefore agreed as follows:

First. The Hocking Company shall forthwith make due application to said Central Trust Company as Trustee under its said Mortgage to release from the lien thereof said stocks of the Ohio and Buckeye Companies and said bonds of the Ohio Company all in accordance with the provisions of said mortgage.

Second. The Chesapeake Company, as owner of more than a majority of the outstanding stock of the Hocking Company, agrees to take due action to procure the sale by the Hocking Company and by the Trustee under said trust agreement of April 30, 1908, of said stocks of the Ohio and Buckeye Companies.

Third. The action provided in Articles First and Second hereof having been taken and said stocks and bonds of the Ohio and Buckeye Companies having been delivered to the Purchaser, together with resignation of all officers and directors requested by the Purchaser, the Purchaser agrees to pay, simultaneously with such de-

livery, to Central Trust Company of New York, Trustee, in cash,

- (a) In respect of said stock of the
Buckeye Company the sum of.....\$ 50,000
- (b) in respect of said bonds of the
Ohio Company the sum of..... 399,900
- (c) in respect of said stock of the
Ohio Company the sum of..... 100

\$450,000

Said stock shall be delivered to the Purchaser endorsed in blank for transfer.

Fourth. The Purchaser hereby waives and releases any and all claims of every character against the Hocking Company, the Chesapeake Company or Central Trust Company of New York by reason of any liability or claim which might be asserted by the Buckeye Company, the Ohio Company or any of the stockholders thereof by reason of any matter or thing in connection with the ownership of the stock of the Buckeye or Ohio Companies, or of the bonds of the Ohio Company or of the management of said Companies from the organization thereof to the date of the delivery of said stocks and bonds under this agreement; but nothing in this agreement shall be construed as a waiver of, or an agreement to waive, on the part of the Purchaser any liability or claim whatsoever which the Purchaser has or may have against any person, firm or corporation other than the Hocking Company, the Chesapeake Company and Central Trust Company of New York, except to the extent of any right of action over against said companies in respect of any such liability or claim.

Fifth. The Hocking Company and the Chesapeake Company hereby waive and release any and all claims of every character or description against the Buckeye Company, the Ohio Company and the Purchaser or any of them by reason of any liability or claim which might be asserted by the Hocking Company, the Chesapeake Company, or either of them, against the Ohio Company or the Buckeye Company by reason of any matter or thing whatsoever occurring to the date of this agreement; except that nothing in this Article Fifth, or elsewhere in this Agreement contained is intended or shall

be construed in any wise to limit or affect or impair the several covenants or obligations of the Buckeye Company contained in said First Consolidated Mortgage of the Hocking Company, and the Hocking Company and the Chesapeake Company respectively do not hereby waive or release the Buckeye Company, its successors or assigns from any such covenants and obligations. If the Hocking Company at any time defaults in the payments or other obligations imposed on it by said consolidated mortgage, and said mortgage is enforced or foreclosed in any way or to any extent, the Hocking Company agrees that it will cause all the property of the Hocking Company to be first exhausted before any recourse is had under said mortgage to the property of the Buckeye Company and agrees to indemnify and to save and hold harmless said Buckeye Company from any loss or damage to or payment by said Buckeye Company under the provisions of said mortgage, save only said two cents per ton royalty above-mentioned.

Sixth. The Hocking and the Chesapeake Companies agree that the net quick assets of the Ohio and Buckeye Companies at the date of the delivery to the Purchaser of the stocks thereof under this agreement shall not be less than the amount thereof on July 1, 1916, except by the amount of fair and proper counsel fees due and the amount of the ordinary current expenses to said date of delivery and of the sinking fund payment currently due from the Buckeye Company to the Trustee of said Consolidated Mortgage, but this agreement shall not obligate the Chesapeake and Hocking Companies or either of them to pay or to provide for any lawful debts or obligations of the Ohio and Buckeye Companies accruing prior to said date.

Seventh. This agreement shall inure to the benefit of and be binding upon the parties hereto and their respective successors and assigns, but nothing herein contained shall be deemed to give to any person, firm or corporation whatever other than the parties hereto and their respective successors and assigns, any right, claim or benefit under or in respect of this agreement.

Eighth. This agreement is made subject to and is not to become effective until the same shall have been approved by the District Court of the United States for

the Southern District of Ohio, Eastern Division, in case No. 1584 in equity in said court, entitled United States of America, plaintiff, v. Lake Shore & Michigan Southern Railway Company, et al., defendants. This agreement shall be submitted for such approval to said Court at the earliest practicable date, and in case said Court shall not prior to the 25th day of November, 1916, have approved the sale contemplated by this agreement and the terms thereof as herein set forth, or in case of its earlier disapproval, then this agreement shall be null and void and none of the parties hereto shall thereafter have any right or remedy against any other hereto by reason hereof.

In Witness Whereof the Hocking Valley Railway Company and the Chesapeake and Ohio Railway Company have caused their respective corporate names to be hereunto subscribed by their respective officers thereunto duly authorized and their respective corporate seals to be hereunto affixed and attested by their respective Secretaries or Assistant Secretaries, and John S. Jones has hereunto subscribed his name and affixed his seal this 7th day of October, 1916.

The Hocking Valley Railway Company,
Attest: By Geo. W. Stevens, President.
Carl Remington, Secretary.
The Chesapeake and Ohio Railway Company,
By Geo. W. Stevens, President.

Attest:
Carl Remington, Secretary.
Witness: John S. Jones, (L. S.)
Wm. Burry.

DOCKET ENTRY.

June 5, 1922. Argued and submitted to court.

SUPPLEMENTAL PETITION.

[Filed November 21, 1922.]

To the Honorable Judges of the Above Named Court,
Sitting in Equity:

Comes now the United States of America, petitioner in the above entitled cause, by T. H. Morrow, its attorney in and for the Southern District of Ohio, acting under the direction of the Attorney General of the United

States, and, having first obtained leave of court, files this supplemental petition in equity, alleging as follows:

1. On August 14, 1911, petitioner exhibited in the United States Circuit Court for the Southern District of Ohio, Eastern Division, its original petition against the above named defendants, alleging that said defendants were engaged in a combination and conspiracy in restraint of interstate trade and commerce in the mining, transporting, and selling of bituminous coal in violation of the act of Congress approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," and praying that said unlawful combination and conspiracy be restrained and dissolved. In particular said petition asked that the domination and control exercised by certain of the defendant railway companies over certain coal companies be completely and effectively terminated.

2. In and by said original petition numerous acts were alleged to have been done in pursuance of said combination and conspiracy, and, among others, it was alleged that in 1899, coincident with the formation of the defendant, The Hocking Valley Railway Company, The Buckeye Coal & Railway Company was organized and incorporated under the laws of the State of Ohio for the purpose of acquiring certain coal lands (about 20,000 acres) in the Hocking coal fields of Ohio; that the entire capital stock of said The Buckeye Coal & Railway Company was thereupon turned over to The Hocking Valley Railway Company, and that said coal property was pledged under a First Consolidated Mortgage to help secure a \$20,000,000 bond issue provided for at the time of the incorporation of the Hocking Valley Railway Company.

3. Said original petition further alleged that other shares of stock and properties of other coal companies were from time to time acquired by The Hocking Valley Railway Company, mortgage bonds being issued in payment therefor, and said stocks and properties being pledged to secure said \$20,000,000 bond issue; and that among the stocks and properties so acquired by The Hocking Valley Railway Company were those of the Ohio Land & Railway Company, General Hocking Coal Company, Raybould Coal Company, Boston Coal Dock &

Wharf Company, New York & Western Coal Company, and Sunday Creek Coal Company.

4. A further allegation was that in June, 1905, certain of the defendants caused to be incorporated the defendant, Sunday Creek Company, for the purpose of uniting in a community of interest the coal properties theretofore owned by The Hocking Valley Railway Company with those of certain other companies in which The Hocking Valley Railway Company, and its ally, The Toledo & Ohio Central Railway Company, were interested; that upon its incorporation the Sunday Creek Company acquired, either by purchase or lease, the properties of The Sunday Creek Coal Company, Continental Coal Company, Kanawha & Hocking Coal & Coke Company, and The Buckeye Coal & Railway Company; and that said Sunday Creek Company ever since its formation has been under the complete domination and control of The Hocking Valley Railway Company and The Toledo & Ohio Central Railway Company.

5. Finally it was alleged that on April 30, 1908, The Hocking Valley Railway Company entered into an agreement for an alleged sale of its coal stocks to the General Trust Company of New York and that at the same time The Toledo & Ohio Central Railway Company entered into an agreement for the alleged sale of its coal stocks to John H. Doyle, of Toledo, Ohio; that in and by said agreements these so-called purchasers were designated as trustees for the stock holders of the Hocking Valley and the Toledo & Ohio Central (said stockholders being The Chesapeake & Ohio Railway Company and The Lake Shore & Michigan Southern Railway Company, respectively), and were in fact the mere agents of said railway companies; and that, notwithstanding said alleged sale of said coal stocks the Sunday Creek Company remained under the domination and control of said railway companies.

6. In respect of the allegations thus particularly described said original petition prayed that the court order, adjudge and decree that the Sunday Creek Company was formed by the defendants, The Hocking Valley Railway Company and The Toledo & Ohio Central Railway Company, and the stock of said Sunday Creek Company was acquired and held by said defendants, in pursuance of the

aforesaid unlawful combination and conspiracy; and that The Hocking Valley Railway Company and The Toledo & Ohio Central Railway Company be forever enjoined from voting said stock and "from exercising or attempting to exercise any control, direction, supervision or influence, whatsoever, directly or indirectly, over the acts or doings of said Sunday Creek Company, by virtue of their aforesaid holdings of stock therein;" and that the petitioner have "such other and further relief that the nature of the case may require and the court may deem proper."

7. The foregoing is an outline of the allegations and prayers of said original petition so far as they are deemed pertinent or material to the issues of the present proceeding, but the right is reserved to refer to such of the other allegations and prayers thereof as may later become necessary or convenient, as if they were fully set forth herein.

8. The United States Circuit Court for the Southern District of Ohio having been abolished by law and its jurisdiction having been duly vested in this court, this cause proceeded to trial in this court, and on December 28, 1912, this court handed down its decision finding the defendants to be parties to an unlawful combination and conspiracy substantially as alleged, and, in particular, holding "that the equity of the Lake Shore and of the Chesapeake & Ohio in the capital stock of the Sunday Creek Company shall be disposed of by absolute sale, and to this end the trustees in whose names such stock is held shall be made parties defendant to this suit."

9. By an order of this court signed and entered on April 18, 1913, The Central Union Trust Company (now The Central Union Trust Company of New York), as trustee under the first consolidated mortgage of The Hocking Valley Railway Company (being the \$20,000,000 first consolidated mortgage hereinbefore referred to), and as trustee of the Sunday Creek stock under the agreement of April 30, 1908, and John H. Doyle, as trustee of the Sunday Creek stock under said agreement of April 30, 1908, were duly made parties defendant to the cause.

10. By a decree filed and entered in the cause on March 14, 1914, it was ordered that the equity and interest of

The Lake Shore & Michigan Southern Railway Company, The Toledo & Ohio Central Railway Company, The Chesapeake & Ohio Railway Company, and The Hocking Valley Railway Company, in the capital stock of Sunday Creek Company, shall be disposed of by absolute sale, and that "said sale be made free from every interest or claim of said trustees (The Central Union Trust Company and John H. Doyle), or either of them, and of any and all the railway companies last named, and of the stockholders of each and all of them;" and further

That for the purpose of enabling said railway companies and said trustees to comply with this decree respecting the sale of stock in the Sunday Creek Company, they and each of them shall have two months from the entry hereof so to comply herewith; and if said railway companies and said trustees are able to sell such stock, they shall be and are hereby authorized and empowered to sell the same, free of any claim, lien, or equity of any of the parties to this suit, including the lien of the Central Trust Company of New York, as trustee under the consolidated mortgage made by the Hocking Valley Railway Company to it, referred to in the findings of fact aforesaid, and freed from any equity in the stockholders, or any of them, of said The Hocking Valley Railway Company or said The Toledo & Ohio Central Railway Company.

11. To further insure the complete separation of the Sunday Creek Company from the railroads controlling it, which it was the purpose of the decree to accomplish, the defendants, The Hocking Valley Railway Company, The Toledo & Ohio Central Railway Company, The Lake Shore & Michigan Southern Railway Company, and The Chesapeake & Ohio Railway Company, and each of them, were perpetually enjoined—
from directly or indirectly owning, holding, or acquiring any stock in said Sunday Creek Company, or in any of the companies hereinbefore named, the property of which is owned, leased, or controlled by said Sunday Creek Company, intending hereby to impose an absolute prohibition against said railway companies, or any of them, owning or controlling any shares of stock in said Sunday Creek Company, or otherwise owning or con-

trolling, directly or indirectly, any interest in any of the coal properties in which that company is interested.

12. On July 26, 1915, defendants presented to the court for its approval a proposed contract for the sale of stock of The Buckeye Coal & Railway Company and the stock and bonds of the Ohio Land & Railway Company, but as the contract contemplated the replacement of the bonds of the latter company with other bonds to be issued covering the property of that company, the court declined to approve the plan until certain modifications were made which would insure the absolute independence of the Ohio Land & Railway Company from the domination and control of The Hocking Valley Railway Company. In its opinion denying approval of said contract this court said:

We cannot too often repeat that the prime purpose of our decree was to insure the complete separation of the railroad interests from the mining interests, so that the former should not and could not dominate the latter. The possibility that such control may be accomplished through ownership of mortgage bonds and the agency of the trustee or through a foreclosure and purchase is more remote and contingent than the prospect that it would follow from stock ownership; but substantial domination in the former manner may be no less effective.

13. Defendants Hocking Valley Railway Company and Toledo & Ohio Central Railway Company not having divested themselves of their interest in certain coal companies (other than Sunday Creek Company) as required by the decree of March 14, 1914, the United States on October 9, 1915, filed a supplemental petition to enforce compliance with said decree, and, among other things, to compel said defendants to sell and dispose of the 2495 shares in The Buckeye Coal & Railway Company held by them, free of every charge or interest of said defendants, including the lien of the Hocking Valley consolidated mortgage. Answers having been filed by said defendants, including the Central Union Trust Company, trustee under said mortgage, and full hearing having been had, this court on May 19, 1916, ordered that—

The equity and interests of the Hocking Valley Railway Company and the Chesapeake & Ohio Railway Company in and to the certain capital stock, to wit, 2500

shares in the Buckeye Coal & Railway Company, 2006 shares in the Ohio Land & Railway Company, and \$1,377,000 face value of the first mortgage bonds of the latter company, shall be disposed of by absolute sale, and the Central Trust Company of New York, as trustee under the first consolidated mortgage of the Hocking Valley, and as trustee under the contract of April 30, 1908, shall, upon the conditions hereinbelow stated, release all claim, as trustee and as pledgee of such shares of stock and such bonds, and of each of them, upon receipt or tender of the proceeds derived from the sale or sales of such stocks and bonds, respectively: Provided, that in every instance such proceeds of sale shall be received and applied by such trustee under and according to the provisions of article 7 of the first consolidated mortgage of the Hocking Valley to such trust company, bearing date March 1, 1899.

Should the Central Trust Company fail seasonably or refuse to release such stocks or bonds, or both, by proper delivery of the certificates representing the stocks or of the bonds mentioned, then and in any such event sale or sales will be made under appropriate orders of the court. The sale and releases of stocks and bonds thus provided for shall be made ~~free~~ from every interest or claim of each of such railway companies and their respective stockholders and also of the Central Trust Company in both of its capacities as trustee.

14. That in an opinion filed simultaneously with said order this court said:

We regard as clear the power of the court to compel the bonds and stocks to be sold free from the lien of the consolidated mortgage, substituting therefor in the hands of the mortgage trustee the proceeds of such sale. One who takes a mortgage upon several items of property of such character that their common ownership or operation may offend against the antitrust law or the commodities clause, and such that the mortgage serves practically to aid in tying them together, must be deemed to hold his mortgage subject to the contingency that if the complete and final separation of one item of the mortgaged property from the remainder becomes essential to the due enforcement of either named law, the court charged with such enforcement may take control of that item, free it

from the consolidating tendency of the mortgage, and substitute therefor its judicially ascertained equivalent. Otherwise the mortgage will stand as the ready means of restoring—or at least tending to restore—those conditions which the court is endeavoring to destroy. It may well be true that a railroad and a coal company under common ownership and management are worth more as security under a mortgage than when independent, and that their effective separation does impair the mortgage security; but this can not make the law helpless.

If the power exists to direct a sale free from lien, the conditions here found make appropriate the exercise of that power. The consolidated mortgage was given by a railroad and a coal company; it challenged attention to those features which carried potential violation of laws already passed or which might be passed; and the values of these pledged stocks and bonds, having nothing except lands to give them value, can be determined with such substantial accuracy that there is little danger of a mistake seriously prejudicial to the mortgages. We would have no confidence that a sale of the mere equity of the Hocking in these stocks and bonds would bring more than temporary independence. The purchaser could not free them from the overwhelming mortgage nor compel its foreclosure, but the danger of foreclosure and the consequent wiping out of this equity would be constant. The influence, if not the practical domination, of the railroad mortgagor, upon whom the purchaser must rely to prevent foreclosure, could not be escaped.

15. Notwithstanding all of the foregoing proceedings clearly contemplating the complete relinquishment by said common carrier defendants of all interest of what kind soever in the stocks or properties of all said coal companies, petitioner is informed and believes and therefore alleges that the defendant, The Hocking Valley Railway Company, still retains an interest in the lands of The Buckeye Coal & Railway Company, now under lease by Sunday Creek Company, in that said lands remain pledged under and subject to the lien of The Hocking Valley Railway Company's first consolidated mortgage, dated March 1, 1899, and maturing July 1, 1999, of which the defendant, The Central Union Trust Company of New York, is trustee, and in that said Buck-

eye Coal & Railway Company remains subject to the provisions of Section 9 of said mortgage wherein it is provided as follows (The Buckeye Coal & Railway Company being referred to as "the coal company" and The Central Union Trust Company of New York as "the trustee"):

Sec. 9. On July 1st, 1900, and on or before July 1st in each and every year thereafter, the coal company shall deliver to the trustee a statement in writing showing the amount of coal mined from lands owned by the coal company and mortgaged hereunder, during the year ending with the 1st day of March next preceding the date of such statement, and simultaneously it shall pay to the trustee hereunder a sum equal to two cents per ton on all coal so mined during such next preceding year.

All sums so received by the trustee shall by it be applied in purchasing bonds hereby secured, in such manner as to it shall seem best, and at such prices as it shall deem best, not exceeding the rate of one hundred and five per centum and accrued interest. All such bonds when so purchased shall be canceled. All sums so received by the trustee and not by it so used within six months from its receipt thereof, shall be returned to the coal company.

16. The lien of said Hocking Valley first consolidated mortgage on the lands of The Buckeye Coal & Railway Company, and the payment by the Buckeye Company to the trustee of said mortgage of two cents per ton on all coal mined from said lands, give the defendant, The Hocking Valley Railway Company, an interest direct and indirect in said Buckeye Company and its properties, and afford to said Hocking Valley Company a domination and control over said Buckeye Company and its properties, contrary to both the letter and purpose of the several opinions, orders and decrees of this court; and said lien and charge of said mortgage should be by said Hocking Valley Company and the trustee under said mortgage fully and completely discharged and released in order that said Buckeye Company and its properties may be wholly removed from the control and domination of said Hocking Valley Company and in order that the interest of said Hocking Valley Company in said Buckeye Company and its properties may be finally terminated.

17. On December 6, 1921, The Buckeye Coal & Rail-

way Company, and The Sunday Creek Coal Company of Ohio, the alleged successor of the Buckeye Coal & Railway Company in and to the coal lands pledged under the aforesaid Hocking Valley first consolidated mortgage, filed a joint petition in this cause concerning the interest retained by The Hocking Valley Railway Company and The Central Union Trust Company of New York, as trustee, in the aforesaid coal lands, thereby submitting to the jurisdiction of this court and becoming liable as parties defendant to any further orders or decrees which the court may see fit to enter.

18. In and by its decree of March 14, 1914, jurisdiction of this cause was retained by this court for the purpose of making such other and further orders and decrees as may be necessary to the due execution of said decree and the complete dissolution of the combination and monopoly therein condemned.

Wherefore petitioner prays that this honorable court order, adjudge, and decree as follows:

1. That the lien of the aforesaid Hocking Valley first consolidated mortgage upon the coal lands formerly owned by The Buckeye Coal & Railway Company, and the obligation of The Buckeye Coal & Railway Company to pay to the trustee two cents per ton on all coal mined from said lands, give to the defendant, The Hocking Valley Railway Company, an interest in and a domination and control over said Buckeye Company and its properties contrary to the decrees entered therein on March 14, 1914, and May 19, 1916, and contrary to the purpose and object of said decrees as expressed in the several opinions of this court.

2. That defendants, The Hocking Valley Railway Company and The Central Union Trust Company of New York, trustees, be required to release the above described coal lands from the lien of said Hocking Valley first consolidated mortgage, and to release The Buckeye Coal & Railway Company from its obligations under Section 9 of said mortgage, upon payment by said Buckeye Company, or its successors in interest, to The Central Union Trust Company of the reasonable value of the rights of said trustee thus to be relinquished.

3. That if the parties shall be unable to agree upon the reasonable value of the rights of the trustee under

said mortgage, then such reasonable value shall be determined in this cause, either by reference of the question to a master to take testimony and make findings, or otherwise, as the court shall determine.

4. That if The Buckeye Coal & Railway Company, or its successors in interest shall be unwilling to pay to the trustee the amount so to be determined as the reasonable value of the rights to be relinquished, then The Hocking Valley Railway Company and The Central Union Trust Company, trustee, shall use their best endeavors to dispose of their rights under Section 9 of said first consolidated mortgage to other interests to be approved by the court.

5. That The Central Union Trust Company of New York, trustee under the said Hocking Valley first consolidated mortgage, be directed that, if by reason of default on said mortgage, it shall at any time be obliged to sell any or all of the coal lands pledged thereunder, it shall dispose of the same separately from the properties of The Hocking Valley Railway Company and to different interests.

6. That petitioner have such other and further relief as may to the court seem just.

7. That petitioner have its costs in this behalf expended.

United States of America,
By Thos. H. Morrow,
United States Attorney.

H. M. Daugherty,
Attorney General.

Guy D. Goff,
Assistant to the Attorney General.

J. A. Fowler,
Abram F. Myers,
Special Assistants to the Attorney General.

ORDER.

[Filed January 27, 1923.]

This cause coming on to be heard upon the supplemental petition of the plaintiff heretofore on the 21st day of November, 1922, by leave and consent of the court filed herein,

It is by the court considered and ordered that the Buck-

eye Coal and Railway Company and the Sunday Creek Coal Company of Ohio be and hereby are made parties defendant to said supplemental petition, and

It is further ordered that copies of said supplemental petition be by petitioner served upon said The Buckeye Coal and Railway Company, upon said The Sunday Creek Coal Company of Ohio and upon The Hocking Valley Railway Company and the Central Union Trust Company of New York; and

It is further ordered that said The Hocking Valley Railway Company, The Central Union Trust Company of New York, The Buckeye Coal and Railway Company and The Sunday Creek Coal Company of Ohio be and hereby are required to answer said supplemental petition with twenty (20) days after service on them of a copy of said supplemental petition and of this order.

L. E. Knappen,

A. C. Denison,

Circuit Judges.

J. W. Peek,

District Judge,
Specially assigned.

ANSWER OF THE SUNDAY CREEK COAL COMPANY AND THE BUCKEYE COAL & RAILWAY COMPANY TO THE SUPPLEMENTAL PETITION OF COMPLAINANT FILED ON NOVEMBER 21, 1922.

[Filed February 19, 1923.]

1. These respondents, The Sunday Creek Coal Company and The Buckeye Coal & Railway Company, answering to said petition, insist that said petition should be dismissed or stricken from the files for the reasons next hereafter set forth, and pray the same benefit of this paragraph of its answer as if said motion to strike or dismiss had been submitted separately. The matters urged in support of this motion are as follows:

2. On December 6, 1921, these respondents, by leave of court on that day obtained, filed herein their petition setting up substantially the same matters as are in said complainant's petition set forth, insisted that the holding of substantial interests by The Hocking Valley Railway Company and the Central Union Trust Company in the

lands owned by these respondents was in violation of former decrees and orders entered in this cause, and prayed that said Trust Company and Railway Company should be required to part with all interests they had in the lands of these respondents.

3. On said December 6, 1921, this court entered an order allowing the filing of said petition of these respondents, and directing that it be served upon the United States District Attorney for the Southern District of Ohio, upon The Hocking Valley Railway Company and upon the Central Union Trust Company, New York, and directing and ordering "that said Railway Company, said Trust Company and said district attorney answer said petition within ten days after service on them of a copy of said petition and of this order." Copies of said order of this court entered December 6, 1921, and of said petition filed on that date were served upon said district attorney, Trust Company and Railway Company, during December, 1921. In January, 1922, said Trust Company and said Railway Company answered fully said petition, but said district attorney and said complainant filed no answer whatsoever, but stood in default.

4. On June 5th after due notice to said district attorney, said Railway Company and said Trust Company, said petition so filed by these respondents came on for hearing before this court, and the entry on that day was made upon the docket as follows:

"Argued and submitted to court."

At that hearing the court asked counsel, including the assistant district attorney, what position complainant wished to take in the matter, and within ten days after said hearing the district attorney received from the Department of Justice at Washington, and submitted to this court, a telegram reading as follows:

"Referring petition relative interest claimed by Hocking Valley Company and Central Union Trust Company in coal lands of Buckeye Coal and Railway Company please thank court for opportunity to submit views and state that department considers public interest so remote that it would not be warranted in taking position on either side of question."

5. Since that time the United States or the district attorney has not filed any answer to the said petition of

respondents, but to this day stands in default for non-compliance with the order entered by this court on December 6, 1921, and said petition filed by respondents should be taken as confessed against them.

6. In 1914, 1915 and 1916, when orders were entered by this court requiring The Hocking Valley Railway Company and The Central Union Trust Company to dispose of all interests they had in the lands of these respondents, as set forth in these respondents' petition filed herein December 6, 1921, and also in complainant's said supplemental petition to which this is an answer, Mr. Daugherty, now Attorney General of the United States, and who signed complainant's said supplemental petition, was an attorney-at-law, practicing in Columbus, Ohio, and was one of the attorneys of said Hocking Valley Railway Company. Representing that company, he had in his office the records and books of said Buckeye Coal & Railway Company. One of his partners, Mr. Rarey, was secretary and treasurer of the said Buckeye Coal & Railway Company. It was, therefore, eminently proper that the Department of Justice should take the position indicated in said telegram, and that it should not have filed said supplemental petition, to which this is an answer.

7. For the reasons aforesaid, these respondents move that said last mentioned petition be now dismissed.

8. If, however, said motion be not allowed, then for further answer to said supplemental petition, these respondents, for the purposes of this answer, admit paragraphs, 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18 of said supplemental petition.

9. For further answer to complainant's said supplemental petition, these respondents also refer to and make part of this their answer all the allegations of said petition filed by them on December 6, 1921, and in their reply filed March 21, 1922, to the answers of said Central Union Trust Company and The Hocking Valley Railway Company, filed in January, 1922, to the said petition of these respondents.

10. These respondents, however, insist that relief should be granted upon the two petitions now before the court according to the prayer of the petition of these respondents, and not according to the prayer of the supple-

mental petition filed by complainant. The relief prayed for in said petition of respondents is in strict accord and harmony with the main decree entered in this cause, and with all subsequent proceedings in this cause. The prayer of complainant's said supplemental petition asks that this court change its theory of this whole case, and asks that these respondents now pay for the total value of said Buckeye Company lands and also the two-cent royalty upon the indebtedness to secure which said mortgage was given to the Central Union Trust Company.

The prayer of complainant's supplemental petition is drawn upon the theory that The Hocking Valley Railway Company and the Central Union Trust Company were guilty of no wrong, of no conspiracy under the Sherman anti-trust Act, and that they should be fully compensated for everything they suffer under the main decree herein entered, and even more than that, for while it is provided under the Hocking Valley Railway mortgage and the contract between The Hocking Valley Railway Company and John S. Jones, a copy of which is attached to the reply of The Buckeye Coal & Railway Company filed herein to the answers filed to the petition of December 6, 1921, that in case of foreclosure or enforcement of said \$20,000,000.00 mortgage, the lands of the Buckeye Company should be last taken upon said indebtedness, and while The Hocking Valley Railway Company guarantees that this shall be done, yet the petition filed by the attorney general asks that full value of all the Buckeye Company lands be now ascertained and paid over on account of said mortgage. No attorney for the Railway Company could ask as much on behalf of the Hocking Railway Company as is now asked for it in this supplemental petition by the attorney general.

We insist that this supplemental petition is uncalled for, and should not be filed, particularly over the name of the present attorney general. Respondents further insist that the prayer of said supplemental petition should be disregarded, and that the facts set forth in said supplemental petition should be taken as an answer confessing all the facts in the petition of these respondents filed December 6, 1921.

William Burry,

W. O. Henderson,

Columbus, O., February 17, 1923.

**ANSWER OF THE HOCKING VALLEY RAILWAY
COMPANY TO THE SUPPLEMENTAL PETITION
OF THE UNITED STATES OF AMERICA FILED
NOVEMBER 3, 1923.**

[Filed March 3, 1923.]

The Hocking Valley Railway Company, for its separate answer to said supplemental petition, says:

1. With respect to the allegations of paragraph 1 of said supplemental petition, it admits that August 4, 1911, the petitioner exhibited in the United States Circuit Court for the Southern District of Ohio, Eastern Division, its original petition (that is, a bill in equity) against the defendants named in the caption of said supplemental petition, that is, The Lake Shore & Michigan Southern Railway Company, The Chesapeake & Ohio Railway Company, The Hocking Valley Railway Company, The Toledo & Ohio Central Railway Company, The Kanawha & Michigan Railway Company, The Zanesville & Western Railway Company, Sunday Creek Company, Continental Coal Company, Kanawha & Hocking Coal & Coke Company, alleging that said defendants were engaged in a combination and conspiracy in restraint of interstate trade and commerce, especially in bituminous coal, in violation of said act of Congress of July 2, 1890, and praying for an injunction against the continuance of said combination and conspiracy and for such other and further relief as the nature of the case might require and the court should deem proper. But as to the particular relief asked by said original petition, this respondent refers thereto for a precise statement thereof.

2. It admits that said original petition contained the allegations referred to in paragraph 2 of said supplemental petition; except it says, it was not alleged in said original petition that the acts stated in that paragraph were done in pursuance of said combination and conspiracy.

3. It admits said original petition contained the allegations stated in paragraph 3 of said supplemental petition; except it says, the allegations of the original petition with respect to mortgage bonds being issued to acquire such other stocks and properties was not to the effect that such bonds were issued in payment therefor.

4. It admits that said original petition contained the

allegations stated in paragraph 4 of said supplemental petition.

5. It admits that said original petition contained the allegations stated in said paragraph 5 of said supplemental petition; except it says, it was not alleged in said original petition, nor was it true, that at the date of said agreements The Chesapeake & Ohio Railway Company and The Lake Shore & Michigan Southern Railway Company, respectively, held all the stock of the Hocking Valley and the Toledo & Ohio Central.

6. It admits said original petition contained a prayer for relief substantially as stated in paragraph 6 of said supplemental petition.

7. It respectfully refers to said original petition for a more exact description of the allegations and prayer thereof.

8. With respect to the allegations of paragraph 8 of said supplemental petition, it admits that, said United States Circuit Court having been abolished by law and its jurisdiction vested in this court, said cause proceeded to trial in this court and on December 28, 1912, this court handed down a decision (203 Fed., 295), finding in effect said defendants to have been parties to an unlawful combination and conspiracy, and holding "that the equity of the Lake Shore and of the Chesapeake & Ohio in the capital stock of the Sunday Creek Company shall be disposed of by absolute sale, and to this end the trustees in whose names such stock is held shall be made parties defendant to this suit." But this respondent says the court did not find said defendants to have been parties to an unlawful combination and conspiracy of the extent alleged in said original petition, as will more fully appear by reference to the decree entered in said cause March 14, 1914, the order of May 19, 1916, and the order of October 7, 1916, hereinafter referred to entered November 10, 1916.

9. It admits the allegations of paragraph 9 of said supplemental petition.

10. It admits the allegations of paragraph 10 of said supplemental petition; but says that said decree, in the particulars stated in said paragraph, had reference to the stock of Sunday Creek Company pledged under said con-

solidated mortgage and not to the lien of said mortgage here in controversy.

11. It admits the allegations of paragraph 11 of said supplemental petition.

It respectfully refers to said decree of March 14, 1914, for a more complete statement of its import and effect.

12. It admits the allegations of paragraph 12 of said supplemental petition; and respectfully refers to the report and motion to confirm sale of stock of The Buckeye Coal & Railway Company and stock and bonds of The Ohio Land & Railway Company, filed by The Hocking Valley Railway Company and The Chesapeake & Ohio Railway Company herein July 26, 1915, and the opinion of the court thereon July 30, 1915, for a more complete statement of said proceedings.

13. It admits that October 9, 1915, the United States filed a petition for the sale by The Hocking Valley Railway Company and The Toledo & Ohio Central Railway Company, in conformity with said decree, of certain interests therein alleged to be held by them in certain coal companies; and, among other things, to require The Hocking Valley Railway Company to sell the capital stock of The Buckeye Coal and Railway Company, free from any claims, lien or equity of any of the parties to this suit, including the lien of the Central Trust Company as trustee under the Hocking Valley consolidated mortgage, and free from any equity in the stockholders of The Hocking Valley Railway Company, and subject to approval, rejection or modification by the court; and that answers having been filed by said defendants, and by said trustee, and full hearing having been had, this court on May 19, 1916, made an order that contained, among other things, the provisions quoted therefrom in paragraph 13 of said supplemental petition. The respondent respectfully refers to said order for a more complete statement thereof. At the date of said order, all but 5 shares of the 2500 shares of said Buckeye stock were pledged under said consolidated mortgage, and it was the lien on said stock created by the pledge thereof that was referred to in said petition and order.

14. It admits an opinion filed simultaneously with said order, in the form of a note (3) thereto, contained among other things the matter quoted in paragraph 4 of said

supplemental petition, except that the word "mortgages" in said quotation should be "mortgagee."

15. With respect to paragraph 15 of said supplemental petition, it admits the lands of The Buckeye Coal and Railway Company remain encumbered by and subject to the lien of The Hocking Valley Railway Company's First Consolidated Mortgage, dated March 1, 1899, and maturing July 1, 1999, of which said Central Trust Company is trustee, and that The Buckeye Coal and Railway Company remains subject to the provisions of section 9 of Article 2 of said mortgage referred to in said paragraph 15 and hereinafter quoted; but respondent is informed and believes, and therefore avers, that the lease of said lands to Sunday Creek Company was forfeited in 1916, and that the respondent, The Sunday Creek Coal Company, an Ohio corporation, claims to have succeeded to the right, title and interest of The Buckeye Coal and Railway Company in and to said lands; and the respondent respectfully refers to said mortgage, and to what is hereinafter stated in paragraph 19, et seq., of this answer, as defining the respective interests of this respondent and said Central Union Trust Company as trustee therein.

16. It denies that the lien of said Hocking Valley First Consolidated Mortgage on said lands, and the provision thereof with respect to the payment to the trustee of 2c a ton on ail coal mined from said lands, give The Hocking Valley Railway Company an interest in said Buckeye Company and its properties within the meaning of said decree; denies that said lien and provision afford to The Hocking Valley Railway Company a domination or control over said Buckeye Company and its properties contrary to the letter or purpose of the opinions, orders and decrees of this court; and denies that said lien or charge should be released or discharged.

17. It admits the allegations of paragraph 17 of said supplemental petition.

18. It admits the allegations of paragraph 18 of said supplemental petition.

19. The Hocking Valley Railway Company and The Buckeye Coal and Railway Company were organized in 1899 in the process of a reorganization that resulted from the foreclosure suit of Central Trust Company of New

York v. The Columbus, Hocking Valley and Toledo Railway Company, et al., reported in 87 Fed., 815. The Columbus, Hocking Valley and Toledo Railway Company, the defendant in that foreclosure suit, was the predecessor in title of The Hocking Valley Railway Company; and The Hocking Coal and Railroad Company, also a defendant in that foreclosure suit, was the predecessor in title of The Buckeye Coal and Railway Company. There were three mortgages involved in that case. The first mortgage involved was a Consolidated Mortgage of The Columbus, Hocking Valley and Toledo Railway Company and The Hocking Coal and Railroad Company made to the Central Trust Company as trustee and dated October 1, 1881, to secure bonds of the railway company, of which \$8,000,000 were issued. That mortgage encumbered the respective properties of those companies, and included the railroad and coal properties covered by the mortgage now in controversy. The bonds secured by the consolidated mortgage of October 1, 1881, were bonds of the railway company only. The second mortgage involved in that suit was a "Joint Mortgage" made August 1, 1884, by The Columbus, Hocking Valley and Toledo Railway Company and The Hocking Coal and Railroad Company, upon the same property, to the Knickerbocker Trust Company, as trustee, to secure bonds to the amount of \$2,000,000 issued by the two companies. The third mortgage involved was a General Lien Mortgage made by the railway company alone and dated October 1, 1896, to the Guaranty Trust Company, as trustee, to secure bonds of the railway company, of which \$2,133,000 were outstanding. So the court will see that The Hocking Coal and Railroad Company had joined in the execution of the consolidated mortgage involved in that controversy and thereby mortgage its property to secure bonds which were obligations only of The Columbus, Hocking Valley and Toledo Railway Company; and that the "Joint Mortgage" was made by both companies to secure bonds which were obligations of both companies. It appears in that case that the railway company controlled and voted all the stock of the coal company. The trustee of the joint mortgage attacked the validity of the consolidated mortgage so far as it embraced the property of The Hocking Coal and Railroad Company. The

court sustained its validity; and ordered a decree of foreclosure. At the foreclosure sale February 24, 1899, the railroad properties and coal properties were purchased by a committee composed of Melville E. Ingalls, Jr., and George H. Gardiner.

Ingalls and Gardiner, having become as aforesaid the purchasers of the railroad property theretofore owned by The Columbus, Hocking Valley and Toledo Railway Company, and of the coal lands theretofore owned by The Hocking Coal and Railroad Company, sold and conveyed said railroad property to The Hocking Valley Railway Company, and sold and conveyed said coal properties to The Buckeye Coal and Railway Company by deed dated February 25, 1899, hereinafter mentioned; said coal property being necessary and convenient for the corporate purpose of The Buckeye Coal and Railway Company.

And thereupon, under date of March 1, 1899, The Hocking Valley Railway Company duly authorized said issue of \$20,000,000 face value of its first consolidated mortgage $4\frac{1}{2}\%$ gold bonds maturing July 1, 1999, and to secure such issue of bonds said railway company, pursuant to due corporate action, made, executed and delivered said mortgage or deed of trust, dated March 1, 1899, to the Central Union Trust Company of New York, as trustee, under its then name of Central Trust Company of New York, in and by which said mortgage or deed of trust, it granted and conveyed unto said Trust Company as such trustee certain real and personal property to it belonging and therein described as security for bonds to be issued thereunder.

In order further to secure said bonds of the railway company, and thus induce the purchase thereof by third parties, The Buckeye Coal and Railway Company, pursuant to due corporate action, joined in the execution of said mortgage, and duly delivered the same, and among other things granted and conveyed to said Trust Company as such trustee said real estate, lands and tenements formerly of The Hocking Coal and Railroad Company; and in order to give added security to said bonds, and to make them more readily salable, various covenants were made by the grantors in said first consolidated mortgage, and among other such covenants said mortgage

contains the following in article 2 thereof, the Buckeye company being therein described as the Coal Company, and said Central Union Trust Company as the Trustee:

"Sec. 9. On July 1st, 1900, and on or before July 1st in each and every year thereafter, the Coal Company shall deliver to the Trustee a statement in writing showing the amount of coal mined from the lands owned by the Coal Company, and mortgaged hereunder, during the year ending with the 1st day of March next preceding the date of such statement, and simultaneously it shall pay to the Trustee hereunder a sum equal to two cents per ton on all coal so mined during such next preceding year.

All sums so received by the Trustee shall by it be used and applied in purchasing bonds hereby secured, in such manner as to it shall seem best, and at such prices as it shall deem best, not exceeding the rate of one hundred and five per centum and accrued interest. All such bonds when so purchased shall be canceled. All sums so received by the Trustee and not by it so used within six months from its receipt thereof, shall be returned to the Coal Company."

Said mortgage likewise contains various and sundry other covenants to be performed by the mortgagors; and respondent prays leave to produce at the trial hereof said original mortgage, or a copy thereof, for the purpose of showing to the court the properties conveyed by the respective grantors therein, and the covenants severally made by them, and of advising the court of the full text and tenor of such grants and covenants and the other terms and provisions of said mortgage.

The facts are that said mortgage was executed and delivered containing the covenants aforesaid, in the circumstances and upon the consideration aforesaid and in the circumstances and upon the consideration stated in said mortgage, wherein among other things it is recited, The Buckeye Coal and Railway Company being sometimes referred to as the Coal Company, The Hocking Valley Railway Company as the Railway Company and said Central Union Trust Company as the Trustee,) that

"The Buckeye Coal and Railway Company, the party of the second part hereto, did acquire all of its real estate, lands and tenements hereinafter described and

conveyed, by and under a deed thereof made and delivered the twenty-fifth day of February, 1899, whereby and whereunder said The Buckeye Coal and Railway Company was required, and did agree, in consideration of such transfer, to join in this mortgage and to grant and convey the said real estate, lands and tenements to the Trustee, upon the terms and conditions of this mortgage, for the further security of said bonds issued and to be issued hereunder by the Railway Company;" and that

"At a meeting of the holders of all of the capital stock of the Coal Company, duly called and held at its office at Columbus, Ohio, on the twenty-fifth day of February, 1899, resolutions were duly adopted by the affirmative vote of the holders of all of the capital stock of the Coal Company, consenting to and approving of the execution of an indenture substantially in the form of these presents, as additional security for the bonds of the Railway Company hereby secured, for an aggregate principal sum not exceeding \$20,000,000;" and that

"The Board of Directors of the Coal Company, at a meeting thereof duly held the twenty-fifth day of February, 1899, duly adopted resolutions in the following words, that is to say:

Resolved, that the President and Secretary of the Company be, and hereby they are authorized and directed, in its behalf and under the corporate seal, to execute and to deliver to Central Trust Company of New York as Trustee, a mortgage or deed of trust to be known as the First Consolidated Mortgage, substantially of the tenor of the draft thereof now submitted at this meeting, upon all of the real estate, lands and tenements of this Company heretofore acquired by this Company from Melville E. Ingalls, Jr., and George H. Gardiner, upon the express condition, and in consideration of the agreement of this Company to grant and convey the said real estate, lands and tenements to Central Trust Company of New York, as Trustee, upon the terms and conditions set forth in the said mortgage, and as additional security for bonds issued and to be issued thereunder for an aggregate principal sum not exceeding twenty million dollars (\$20,000,000), such mortgage to be executed and to be delivered jointly by this Company and The Hocking Valley Railway Company."

And that, "This indenture is substantially of the tenor of the draft thereof submitted to and approved by the Stockholders of the Railway Company and also by the Stockholders of the Coal Company at their said meetings, and submitted to and approved by the Board of Directors of the Railway Company and also by the Board of Directors of the Coal Company at their said meetings;" and further:

* * * * *

"And the Coal Company, the party of the second part, in consideration of the premises, and of the purchase and acceptance of such bonds by the holders thereof, and of the sum of one dollar to it by the trustee duly paid, at or before the ensealing and delivery of these presents, the receipt whereof hereby is acknowledged, has executed and delivered these presents, and has granted, bargained, sold, aliened, remised, released, conveyed, confirmed, assigned, transferred and set over, and by these presents does grant, bargain, sell, alien, remise, release, convey, confirm, assign, transfer and set over, unto the Trustee, the party of the third part, its successors and assigns forever:

All and singular the real estate, lands and tenements formerly of The Hocking Coal and Railroad Company," and so forth, describing the lands in question.

Said mortgage further provided, in article 1 thereof, that all bonds to be secured thereby, from time to time, should be executed, and should be delivered by said railway company to said trustee for certification, and thereupon, as provided in said article, the trustee should certify and deliver the same; and that only such bonds as should bear thereon such certificate should be secured by said indenture or entitled to any lien or benefit thereunder; and that every such certificate of said trustee, upon any bond executed in behalf of said railway company, should be conclusive evidence that the bond so certified was duly issued under said mortgage, and is entitled to the benefit thereof. Subsequently to the execution and delivery of said mortgage or deed of trust as aforesaid, and prior to the filing of the original bill in this suit, said Trust Company as such trustee, did in conformity with the terms of said mortgage duly certify \$16,156,000 face value of bonds executed and delivered

by and in behalf of said railway company, in conformity with the terms of said mortgage, payable to bearer and intended for general circulation, and thereupon each and all of said bonds so certified were duly delivered pursuant to the terms of said mortgage, and all of said bonds as this respondent is informed and believes were duly issued; and of said bonds so issued \$16,022,000 face value are now outstanding in the hands of numerous bona fide holders for value, and are entitled to the full benefit and security of said mortgage.

Said mortgage was forthwith filed for record and recorded in each of the counties wherein the real and personal property therein described was and is situated or employed, including the counties hereinafter specifically named; and was delivered to the recorder of said Hocking county for record and filed for record in the office of said recorder on March 4, 1899, and duly recorded in Mortgage Records of said office in volume 21 at pages 3 to 67, inclusive; and was delivered to the recorder of said Perry county for record and filed for record in the office of said recorder on March 18, 1899, and duly recorded in the Mortgage Record of said office in volume 5 at pages 129 to 180, inclusive; and was delivered to the recorder of said Athens county for record and filed for record in the office of said recorder on March 20, 1899, and duly recorded in the Mortgage Records of said office in volume 33 at pages 1 to 51, inclusive.

20. The Central Union Trust Company as such trustee appealed from said order of May 19, 1916, and in the following November dismissed said appeal; and on or about November 10, 1916, the stock of said Buckeye company was sold to John S. Jones in conformity with said order of sale and with an order approving said sale of date October 7, 1916, entered in this cause November 10, 1916.

Said Jones or he and others represented by him in said purchase have ever since been and now are the real or beneficial owners of all said stock. Said sale was made by and pursuant to a written contract dated October 7, 1916, by and between The Hocking Valley Railway Company, of the first part, The Chesapeake and Ohio Railway Company, of the second part, and John S. Jones, of the third part.

In and by said contract, it was recited and agreed by

and between said parties, as essential terms thereof, that The Buckeye Coal and Railway Company is a corporation organized under the laws of Ohio, with an authorized capital stock of \$250,000, divided into 2500 shares of the par value of \$100 each, all of which was then outstanding; that The Hocking Valley Railway Company theretofore acquired all said outstanding capital stock and duly pledged and deposited the same, (except five shares held by directors thereof), under said first consolidated mortgage, made by The Hocking Valley Railway Company and The Buckeye Coal and Railway Company to Central Trust Company of New York, Trustee, securing an authorized issue of \$20,000,000 of first consolidated mortgage $4\frac{1}{2}\%$ gold bonds of The Hocking Valley Railway Company, and that said stock was at the date of said contract on deposit with and held by said trustee under said mortgage; that under date of April 30, 1908, The Hocking Valley Railway Company entered into a trust agreement with said Central Trust Company of New York, as Trustee, whereby all said stock was, subject to the lien of said first consolidated mortgage, conveyed to said Trust Company, in trust to dispose of the equity in said stock, subject to the lien of said mortgage and the rights of said trustee thereunder, when and as directed in writing by the holders or owners of record of a majority in amount of the stock of The Hocking Valley Railway Company; that The Chesapeake and Ohio Railway Company now owned more than a majority of the stock of The Hocking Valley Railway Company, and was therefore entitled under said trust agreement last mentioned to give directions for the disposal of said equity in said stock; that by said mortgage, The Buckeye Coal and Railway Company conveyed certain real estate in said mortgage described, as further security for the payment of said mortgage bonds, and among other things agreed to pay the said trustee thereunder, a sum equal to 2c a ton on all coal mined from the property of The Buckeye Coal and Railway Company so mortgaged, to be applied in purchasing bonds secured by said mortgage; and that The Hocking Valley Railway Company and The Chesapeake and Ohio Railway Company desired to procure the release of said stock of The Buckeye Coal and Railway Company from the lien of

said first consolidated mortgage, and desired to effect the sale thereof, and said John S. Jones desired to purchase the same, upon the terms and conditions in said contract provided.

And thereupon, and in consideration of the premises so recited, it was in and by said contract agreed by and between said parties that The Hocking Valley Railway Company should forthwith make due application to said trustee under said mortgage to release from the lien thereof said stock of The Buckeye Coal and Railway Company, in accordance with the provisions of said mortgage; that The Chesapeake and Ohio Railway Company, as owner of more than a majority of the outstanding stock of The Hocking Valley Railway Company, should take due action to procure the sale by The Hocking Valley Railway Company and by said trustee under said trust agreement of April 30, 1908, of said stock of The Buckeye Coal and Railway Company, and that the action so provided for having been taken and said stock delivered to said Jones, together with resignations of all officers and directors requested by him, said Jones would pay simultaneously with such delivery, to said Trust Company as trustee, in cash, in respect of said stock of The Buckeye Coal and Railway Company the sum of \$50,000, said stock to be delivered to said Jones endorsed in blank for transfer.

Said stock of The Buckeye Coal and Railway Company, agreed to be sold as aforesaid, was so sold for said price of \$50,000, in consideration of the facts so recited that said property was encumbered as aforesaid, an abatement being made on that account in the price that otherwise said stock would have sold for, as without said encumbrance of said property said stock would have been of much greater value; all of which said Jones then well knew.

And in further consideration of said sale to him as aforesaid, said Jones in and by said contract further agreed that he thereby waived and released any and all claim of every character against The Hocking Valley Railway Company, The Chesapeake and Ohio Railway Company, or said Central Trust Company, by reason of any liability or claim which might be asserted by said The Buckeye Coal and Railway Company by reason of

any matter or thing in connection with the ownership of said stock or the management of said company from the organization thereof to the date of the delivery of said stock under said agreement.

And the Hocking Valley Railway Company and The Chesapeake and Ohio Railway Company, in and by said contract, did waive and release any and all claims of every character and description against said The Buckeye Coal and Railway Company and said purchaser, or either of them, by reason of any liability or claim which might be asserted by The Hocking Valley Railway Company, The Chesapeake and Ohio Railway Company, or either of them, against The Buckeye Coal and Railway Company, by reason of any matter or thing whatsoever occurring to the date of said agreement; except, it was therein provided, that nothing contained in said agreement was intended or should be construed in any wise to limit or affect or impair the several covenants or obligations of The Buckeye Coal and Railway Company contained in said first consolidated mortgage.

And it was further agreed in and by said contract that if The Hocking Valley Railway Company should at any time default in the payment or obligations imposed on it by said consolidated mortgage, and said mortgage should be enforced or foreclosed in any way or to any extent, The Hocking Valley Railway Company would cause all the property of The Hocking Valley Railway Company to be first exhausted before any recourse is had under said mortgage to the property of The Buckeye Coal and Railway Company, and agreed to indemnify and to save and to hold harmless said The Buckeye Coal and Railway Company from any loss or damage to or payment of said The Buckeye Coal and Railway Company, under the provisions of said mortgage, save only said 2c a ton above mentioned.

And said parties to said contract therein mutually agreed that said contract should inure to the benefit of and be binding upon the parties thereto, and their respective successors and assigns.

Said order in this suit of May 19, 1916, to comply with which said sale was negotiated by The Hocking Valley Railway Company, required that said contract should be, and it was expressly made, subject to the approval of this

court; and in pursuance of that requirement, the parties to said contract appeared in this suit for that purpose, and duly submitted said contract to this court and thereupon, by its order of October 7, 1916, this court found that said purchaser was satisfactory to the court, and that said sale complied with said order entered May 19, 1916, and that the terms of said contract of sale were, and the amount of cash paid for said stock was, such as to fully protect the interests of said Trust Company as such trustee, and that the price proposed to be paid for said stock was the reasonable value thereof, and thereupon it ordered that said sale and the terms thereof as embodied in said contract be, and the same thereby were, approved, and that said Trust Company as such trustee, upon due application to it in accordance with the terms of said first consolidated mortgage, as provided in said contract, release said stock from the lien of said mortgage upon the payment to it of the purchase price thereof; which said order was duly entered in said cause November 10, 1916, upon the dismissal of said appeal taken by the Trust Company from said order of May 19, 1916, and thereupon on or about said November 10, 1916, said sale was consummated in accordance with the terms and conditions of said contract.

21. On or about April 17, 1919, said John S. Jones, having theretofore acquired as aforesaid all the capital stock and securities of The Buckeye Coal and Railway Company and of two other corporations known respectively as Sunday Creek Coal Company of New Jersey and The Ohio Land and Railway Company, in order to bring about a consolidation of the properties of said companies under one corporation, caused the respondent The Sunday Creek Coal Company to be incorporated under the laws of Ohio, and on or about May 1, 1919, in order to effect such consolidation, caused each of said three corporations in this paragraph first named to convey, and they each did convey, all of their respective properties to said The Sunday Creek Coal Company for a nominal consideration, in consideration of the fact that the latter company exchanged with said John S. Jones all its capital stock for said stock and securities of said three other companies; which conveyance of The Buckeye Coal and Railway Company included the lands

owned by that company and mortgaged under said First Consolidated Mortgage, said lands being situate in the counties of Hocking, Perry and Athens in the State of Ohio.

22. Among the covenants and provisions of said First Consolidated Mortgage the following are made and provided in Article Ten thereof, The Hocking Valley Railway Company being therein referred to as the Railway Company and The Buckeye Coal and Railway Company as the Coal Company:

"Section 1. All the covenants, stipulations, promises and agreements in this Indenture contained, by or in behalf of the Railway Company or of the Coal Company, severally and respectively, shall bind such Company, its successor and assigns, whether so expressed or not.

Sec. 2. Nothing contained in this Indenture or in any bond hereby secured, shall prevent any consolidation, or merger of the Railway Company or of the Coal Company with each other or with any other corporation or any conveyance and transfer, subject to the continuing lien of this Indenture and to all the provisions hereof, of all the mortgaged and pledged premises as an entirety to a railroad corporation at that time existing under and by virtue of the laws of any State or States, and entitled to acquire the same; provided, however, that such consolidation, merger or sale shall not impair the lien and security of this Indenture, or any of the rights or powers of the Trustee, or of the bondholders hereunder, and that upon such consolidation, merger or sale, the due and punctual payment of the principal and interest of all of the said bonds according to their tenor, and the due and punctual performance and observance of all the covenants and conditions of this Indenture, shall be assumed by the corporation formed by such consolidation or merger, or purchasing as aforesaid."

23. On or about April 21, 1919, said The Buckeye Coal and Railway Company, as plaintiff, commenced a civil action against said Central Union Trust Company and The Hocking Valley Railway Company, as defendants, in the Court of Common Pleas of said county of Perry, to quiet its title to said lands, being case No. 5895 in said court. On or about November 12, 1919, The Sunday Creek Coal Company had itself made a party plain-

tiff to said action, and thereupon entered its appearance therein as such plaintiff, and thereafter participated as such a plaintiff in the litigation. In said cause, and upon the pleadings therein, there was an issue between the parties as to the validity of said mortgage and covenants, and upon the trial thereof, the Court of Common Pleas by its judgment upon the merits duly given and entered on or about January 8, 1920, found and adjudged the same against the plaintiffs therein and in favor of the defendants therein, sustaining the validity of said mortgage and covenants.

Thereupon, the plaintiff in said action appealed said cause to the Court of Appeals for said county, being case No. 70 in that court, and at the trial of said cause upon appeal, upon the same issues, said Court of Appeals by its judgment upon the merits duly given and entered on or about March 4, 1921, found and adjudged the same in favor of the defendants therein and against the plaintiffs therein, and did order, adjudge and decree that said First Consolidated Mortgage and the covenants of The Buckeye Coal and Railway Company therein contained are valid and binding obligations, and a good and valid lien upon the real property in said mortgage described, and that the petition of the plaintiffs therein be and the same was dismissed upon the merits, with costs; and the plaintiffs therein having thereupon filed a motion for a new trial, said Court of Appeals, on consideration thereof, overruled said motion; to all of which the plaintiffs therein did except and take their bill of exceptions thereto.

Thereafter on or about May 5, 1921, the plaintiffs in said cause, filed their motion in the Supreme Court of Ohio, which was given case No. 17047 in that court, for an order directing said Court of Appeals to certify the record in said cause to the Supreme Court for review; on consideration whereof, said court on or about June 7, 1921, overruled said motion; and said judgment and proceedings of said Court of Appeals are in full force and unreversed and are res judicatae and conclusive upon the parties to said suit as to the validity of the mortgage and the covenants aforesaid.

Wherefore, respondent prays that said petition may be dismissed, for costs and all proper relief.

The Hocking Valley Railway Company,
By Wilson & Rector,
John F. Wilson,
Its Solicitors.

Lawrence Maxwell,
A. C. Rearick,
John F. Wilson,
Of Counsel.

**ANSWER OF CENTRAL UNION TRUST COMPANY
OF NEW YORK TO THE SUPPLEMENTAL PE-
TITION OF THE UNITED STATES OF AMER-
ICA FILED NOVEMBER 21, 1922.**

[Filed March 3, 1923.]

Central Union Trust Company of New York, for its separate answer to said supplemental petition, says:

1. With respect to the allegations of paragraph 1 of said supplemental petition, it admits that August 4, 1911, the petitioner exhibited in the United States Circuit Court for the Southern District of Ohio, Eastern Division, its original petition (that is a Bill in Equity) against the defendants named in the caption of said supplemental petition, that is The Lake Shore & Michigan Southern Railway Company, The Chesapeake & Ohio Railway Company, The Hocking Valley Railway Company, The Toledo & Ohio Central Railway Company, The Kanawha & Michigan Railway Company, The Zanesville & Western Railway Company, Sunday Creek Company, Continental Coal Company, Kanwaha & Hocking Coal & Coke Company, alleging that said defendants were engaged in a combination and conspiracy in restraint of interstate trade and commerce, especially in bituminous coal, in violation of said act of Congress of July 2, 1890, and praying for an injunction against the continuance of said combination and conspiracy and for such other and further relief as the nature of the case might require and the court should deem proper. But as to the particular relief asked by said original petition, this respondent refers thereto for a precise statement thereof.

2. It admits that said original petition contained the allegations referred to in paragraph 2 of said supple-

mental petition; except it says, it was not alleged in said original petition that the acts stated in that paragraph were done in pursuance of said compination and conspiracy.

3. It admits said original petition contained the allegations stated in paragraph 3 of said supplemental petition; except is says, the allegation of the original petition with respect to mortgage bonds being issued to acquire such other stocks and properties was not to the effect that such bonds were issued in payment therefor.

4. It admits that said original petition contained the allegations stated in paragraph 4 of said supplemental petition.

5. It admits that said original petition contained the allegations stated in paragraph 5 of said supplemental petition; except it says, it was not alleged in said original petition, nor was it true, that at the date of said agreements The Chesapeake & Ohio Railway Company and The Lake Shore & Michigan Southern Railway Company, respectively, held all the stock of the Hocking Valley and the Toledo & Ohio Central.

6. It admits said original petition contained a prayer for relief substantially as stated in paragraph 6 of said supplemental petition.

7. It respectfully refers to said original petition for a more exact description of the allegations and prayer thereof.

8. With respect to the allegations of paragraph 8 of said supplemental petition, it admits that, said United States Circuit Court having been abolished by law and its jurisdiction vested in this Court, said cause proceeded to trial in this court and on December 28, 1912, this court handed down a decision (203 Fed. 295), finding in effect said defendants to have been parties to an unlawful combination and conspiracy, and holding "that the equity of the Lake Shore and of the Chesapeake & Ohio in the capital stock of the Sunday Creek Company shall be disposed of by absolute sale, and to this end the trustees in whose names such stock is held shall be made parties defendant to this suit." But this respondent says the court did not find said defendants to have been parties to an unlawful combination and conspiracy of the extent alleged in said original petition, as will more

fully appear by reference to the decree entered in said cause March 14, 1914, the order of May 19, 1916, and the order of October 7, 1916, hereinafter referred to entered November 10, 1916.

9. It admits the allegations of paragraph 9 of said supplemental petition.

10. It admits the allegations of paragraph 10 of said supplemental petition; but says that said decree, in the particulars stated in said paragraph, had reference to the stock of Sunday Creek Company pledged under said consolidated mortgage and not to the lien of said mortgage here in controversy.

11. It admits the allegations of paragraph 11 of said supplemental petition.

It respectfully refers to said decree of March 14, 1914, for a more complete statement of its import and effect.

12. It admits the allegations of paragraph 12 of said supplemental petition; and respectfully refers to the report and motion to confirm sale of stock of The Buckeye Coal & Railway Company and stocks and bonds of The Ohio Land & Railway Company, filed by The Hocking Valley Railway Company and The Chesapeake & Ohio Railway Company herein July 26, 1915, and the opinion of the court thereon, July 30, 1915, for a more complete statement of said proceedings.

13. It admits that October 9, 1915, the United States filed a petition for the sale by The Hocking Valley Railway Company and The Toledo & Ohio Central Railway Company, in conformity with said decree, of certain interests therein alleged to be held by them in certain coal companies; and, among other things, to require The Hocking Valley Railway Company to sell the capital stock of The Buckeye Coal & Railway Company, free from any claims, lien or equity of any of the parties to this suit, including the lien of the respondent as trustee under the Hocking Valley consolidated mortgage, and free from any equity in the stockholders of The Hocking Valley Railway Company, and subject to approval, rejection or modification by the court; and that answers having been filed by said defendants, and by this respondent as such trustee, and full hearing having been had, this court on May 19, 1916, made an order that contained, among other things, the provisions quoted there-

from in paragraph 13 of said supplemental petition. The respondent respectfully refers to said order for a more complete statement thereof. At the date of said order, all but 5 shares of the 2500 shares of said Buckeye stock were pledged under said consolidated mortgage, and it was the lien of the respondent on said stock as such pledge that was referred to in said petition and order.

14. It admits an opinion filed simultaneously with said order, in the form of a note (3) thereto, contained among other things the matter quoted in paragraph 14 of said supplemental petition, except that the word "mortgages" in said quotation should be "mortgage."

15. With respect to paragraph 15 of said supplemental petition, it admits the lands of The Buckeye Coal & Railway Company remain encumbered by and subject to the lien of The Hocking Valley Railway Company's first consolidated mortgage, dated March 1, 1899, and maturing July 1, 1999, of which this respondent is trustee, and that The Buckeye Coal & Railway Company remains subject to the provisions of Section 9 of Article 2 of said mortgage referred to in said paragraph 15 and hereinafter quoted; but respondent is informed and believes, and therefore avers, that the lease of said lands to Sunday Creek Company was forfeited in 1916, and that the respondent The Sunday Creek Coal Company, an Ohio corporation, claims to have succeeded to the right, title and interest of The Buckeye Coal & Railway Company in and to said lands; and the respondent respectfully refers to said mortgage, and to what is hereinafter stated in paragraph 19, et seq. of this answer, as defining the respective interests of The Hocking Valley Railway Company and this respondent therein.

16. It denies that the lien of said Hocking Valley first consolidated mortgage on said lands, and the provision thereof with respect to the payment to the trustee of two cents a ton on all coal mined from said lands, give The Hocking Valley Railway Company an interest in said Buckeye Company and its properties within the meaning of said decree; denies that said lien and provisions afford to The Hocking Valley Railway Company a domination or control over said Buckeye Company and its

properties contrary to the letter or purpose of the opinions, orders and decrees of this court; and denies that said lien or charge should be released or discharged.

17. It admits the allegations of paragraph 17 of said supplemental petition.

18. It admits the allegations of paragraph 18 of said supplemental petition.

19. The Hocking Valley Railway Company and The Buckeye Coal & Railway Company were organized in 1899 in the process of a reorganization that resulted from the foreclosure suit of Central Trust Company of New York v. The Columbus, Hocking Valley & Toledo Railway Company, et al., reported in 87 Fed. 815. The Columbus, Hocking Valley & Toledo Railway Company, the defendant in that foreclosure suit, was the predecessor in title to the Hocking Valley Railway Company; and The Hocking Coal and Railroad Company, also a defendant in that foreclosure suit, was the predecessor in title of The Buckeye Coal & Railway Company. There were three mortgages involved in that case. The first mortgage involved was a consolidated mortgage of The Columbus, Hocking Valley & Toledo Railway Company and The Hocking Coal and Railroad Company made to the Central Trust Company as trustee and dated October 1, 1881, to secure bonds of the railway company, of which \$8,000,000 were issued. That mortgage encumbered the respective properties of those companies, and included the railroad and coal properties covered by the mortgage now in controversy. The bonds secured by the consolidated mortgage of October 1, 1881, were the bonds of the railway company only. The second mortgage involved in that suit was a "joint mortgage" made August 1, 1884, by The Columbus, Hocking Valley & Toledo Railway Company and The Hocking Coal & Railroad Company, upon the same property, to the Knickerbocker Trust Company, as trustee, to secure bonds to the amount of \$2,000,000 issued by the two companies. The third mortgage involved was a general lien mortgage made by the railway company alone and dated October 1, 1896, to the Guaranty Trust Company, as trustee, to secure bonds of the railway company, of which \$2,133,000 were outstanding. So the court will see that The Hocking Coal & Railroad Company had

joined in the execution of the consolidated mortgage involved in that controversy and thereby mortgaged its property to secure bonds which were obligations only of The Columbus, Hocking Valley & Toledo Railway Company; and that the "joint mortgage" was made by both companies to secure bonds which were obligations of both companies. It appears in that case that the railway company controlled and voted all the stock of the coal company. The trustee of the joint mortgage attacked the validity of the consolidated mortgage so far as it embraced the property of The Hocking Coal & Railroad Company. The court sustained its validity; and ordered a decree of foreclosure. At the foreclosure sale February 24, 1899, the railroad properties and coal properties were purchased by a committee composed of Melville E. Ingalls, Jr., and George H. Gardiner.

Ingalls and Gardiner, having become as aforesaid the purchasers of the railroad property theretofore owned by the Columbus, Hocking Valley & Toledo Railway Company, and of the coal lands theretofore owned by The Hocking Coal & Railroad Company, sold and conveyed said railroad property to The Hocking Valley Railway Company, and sold and conveyed said coal properties to The Buckeye Coal & Railway Company by deed dated February 25, 1899, hereinafter mentioned; said coal property being necessary and convenient for the corporate purpose of The Buckeye Coal & Railway Company.

And thereupon, under date of March 1, 1899, The Hocking Valley Railway Company duly authorized said issue of \$20,000,000 face value of its first consolidated mortgage 4½% gold bonds maturing July 1, 1999, and to secure such issue of bonds said railway company, pursuant to due corporate action, made, executed and delivered said mortgage or deed of trust, dated March 1, 1899, to this respondent as trustee, under its then name of Central Trust Company of New York, in and by which said mortgage or deed of trust, it granted and conveyed unto this respondent as such trustee certain real and personal property to it belonging and therein described as security for bonds to be issued thereunder.

In order further to secure said bonds of the railway

company, and thus induce the purchase thereof by third parties, The Buckeye Coal & Railway Company, pursuant to due corporate action, joined in the execution of said mortgage, and duly delivered the same, and among other things granted and conveyed to this respondent as such trustee said real estate, lands and tenements formerly of The Hocking Coal & Railroad Company; and in order to give added security to said bonds, and to make them more readily saleable, various covenants were made by the grantors in said first consolidated mortgage, and among other such covenants said mortgage contains the following in Article 2 thereof, the Buckeye Company being therein described as the Coal Company, and this respondent as the trustee:

"Sec. 9. On July 1st, 1900, and on or before July 1st in each and every year thereafter, the Coal Company shall deliver to the trustee a statement in writing showing the amount of coal mined from the lands owned by the Coal Company and mortgaged hereunder during the year ending with the 1st day of March next preceding the date of such statement, and simultaneously it shall pay to the trustee hereunder a sum equal to two cents per ton on all coal so mined during such next preceding year.

All sums so received by the trustee shall by it be used and applied in purchasing bonds hereby secured, in such manner as to it shall seem best, and at such prices as it shall deem best, not exceeding the rate of one hundred and five per centum and accrued interest. All such bonds when so purchased shall be canceled. All sums so received by the trustee and not by it so used within six months from its receipt thereof, shall be returned to the Coal Company."

Said mortgage likewise contains various and sundry other covenants to be performed by the mortgagors; and respondent prays leave to produce at the trial hereof said original mortgage, or a copy thereof, for the purpose of showing to the court the properties conveyed by the respective grantors therein, and the covenants severally made by them, and of advising the court of the full text and tenor of such grants and covenants and the other terms and provisions of said mortgage.

The facts are that said mortgage was executed and

delivered containing the covenants aforesaid in the circumstances and upon the consideration aforesaid, and in the circumstances and upon the consideration stated in said mortgage, wherein among other things it is recited, (The Buckeye Coal and Railway Company being sometimes referred to as the Coal Company, The Hocking Valley Railway Company as the Railway Company and this respondent as the trustee, that

"This Buckeye Coal and Railway Company, the party of the second part hereto, did acquire all of its real estate, lands and tenements hereinafter described and conveyed, by and under a deed thereof made and delivered the twenty-fifth day of February, 1899, whereby and whereunder said The Buckeye Coal and Railway Company was required, and did agree, in consideration of such transfer, to join in this mortgage and to grant and convey the said real estate, lands and tenements to the Trustee, upon the terms and conditions of this mortgage, for the further security of the said bonds issued and to be issued hereunder by the Railway Company;" and that

"At a meeting of the holders of all of the capital stock of the Coal Company, duly called and held at its office at Columbus, Ohio, on the twenty-fifth day of February, 1899, resolutions were duly adopted by the affirmative vote of the holders of all of the capital stock of the Coal Company, consenting to and approving of the execution of an indenture substantially in the form of these presents, as additional security for the bonds of the Railway Company hereby secured, for an aggregate principal sum not exceeding \$20,000,000.00;" and that

"The Board of Directors of the Coal Company, at a meeting thereof duly held the twenty-fifth day of February, 1899, duly adopted resolutions in the following words, that is to say:

Resolved, that the president and secretary of the company, be, and hereby they are authorized and directed in its behalf and under the corporate seal, to execute and to deliver to Central Trust Company of New York as Trustee, a mortgage or deed of trust to be known as the first consolidated mortgage, substantially of the tenor of the draft thereof now submitted at this meeting, upon all of the real estate, lands and tenements of this company heretofore acquired by this company from Mel-

ville E. Ingalls, Jr., and George H. Gardiner, upon the express condition, and in consideration of the agreement of this company to grant and convey the said real estate, lands and tenements to Central Trust Company of New York, as Trustee, upon the terms and conditions set forth in the said mortgage, and as additional security for bonds issued and to be issued thereunder for an aggregate principal sum not exceeding twenty million dollars (\$20,000,000), such mortgage to be executed and to be delivered jointly by this company and The Hocking Valley Railway Company."

And that, "This indenture is substantially of the tenor of the draft thereof submitted to and approved by the stockholders of the Railway Company and also by the stockholders of the Coal Company at their said meetings, and submitted to and approved by the Board of Directors of the Railway Company and also by the Board of Directors of the Coal Company at their said meetings;" and further:

"And the Coal Company, the party of the second part, in consideration of the premises, and of the purchase and acceptance of such bonds by the holders thereof, and of the sum of one dollar to it by the trustee duly paid, at or before the ensealing and delivery of these presents, the receipt whereof hereby is acknowledged, has executed and delivered these presents, and has granted, bargained, sold, aliened, remised, released, conveyed, confirmed, assigned, transferred and set over, and by these presents does grant, bargain, sell, alien, remise, release, convey, confirm assign, transfer and set over, unto the Trustee, the party of the third part, its successors and assigns forever:

All and singular the real estate, lands and tenements formerly of The Hocking Coal and Railroad Company," and so forth, describing the lands in question.

Said mortgage further provided, in Article 1 thereof, that all bonds to be secured thereby, from time to time, should be executed, and should be delivered by said Railway Company to said Trustee for certification, and thereupon, as provided in said article, the Trustee should certify and deliver the same; and that only such bonds as should bear thereon such certificate should be secured by said indenture or entitled to any lien or benefit there-

under; and that every such certificate of said Trustee, upon any bond executed in behalf of said Railway Company, should be conclusive evidence that the bond so certified was duly issued under said mortgage, and is entitled to the benefit thereof. Subsequently to the execution and delivery of said mortgage or deed of trust as aforesaid, and prior to the filing of the original bill in this suit, the respondent as such Trustee, did in conformity with the terms of said mortgage duly certify \$16,156,000 face value of bonds executed and delivered by and in behalf of said Railway Company, in conformity with the terms of said mortgage, payable to bearer and intended for general circulation, and thereupon each and all of said bonds so certified were duly delivered pursuant to the terms of said mortgage, and all of said bonds as this respondent is informed and believes were duly issued; and of said bonds so issued \$16,022,000 face value are now outstanding in the hands of numerous bona fide holders for value, and are entitled to the full benefit and security of said mortgage.

Said mortgage was forthwith filed for record and recorded in each of the counties wherein the real and personal property therein described was and is situated or employed, including the counties hereinafter specifically named; and was delivered to the recorder of said Hocking county for record and filed for record in the office of said recorder on March 4, 1899, and duly recorded in the mortgage records of said office in volume 21 at pages 3 to 67 inclusive; and was delivered to the recorder of said Perry county for record and filed for record in the office of said recorder on March 18, 1899, and duly recorded in the mortgage records of said office in volume 5 at pages 129 to 180 inclusive; and was delivered to the recorder of said Athens county for record and filed for record in the office of said recorder on March 20, 1899, and duly recorded in the mortgage records of said office in volume 33 at pages 1 to 51 inclusive.

20. The respondent appealed from said order of May 19, 1916, and in the following November dismissed said appeal; and on or about November 10, 1916, the stock of said Buckeye Company was sold to John S. Jones in conformity with said order of sale and with an order ap-

proving said sale of date October 7, 1916, entered in this cause November 10, 1916.

Said Jones or he and others represented by him in said purchase, have ever since been and now are the real or beneficial owners of all said stock. Said sale was made by and pursuant to a written contract dated October 7, 1916, by and between The Hocking Valley Railway Company, of the first part, The Chesapeake and Ohio Railway Company, of the second part, and John S. Jones, of the third part.

In and by said contract, it was recited and agreed by and between said parties, as essential terms thereof, that The Buckeye Coal and Railway Company is a corporation organized under the laws of Ohio, with an authorized capital stock of \$250,000, divided into 2500 shares of the par value of \$100 each, all of which was then outstanding; that The Hocking Valley Railway Company theretofore acquired all said outstanding capital stock and duly pledged and deposited the same, (except 5 shares held by directors thereof) under said first consolidated mortgage, made by The Hocking Valley Railway Company and The Buckeye Coal and Railway Company to Central Trust Company of New York, Trustee, securing an authorized issue of \$20,000,000 of first consolidated mortgage 4½% gold bonds of The Hocking Valley Railway Company, and that said stock was at the date of said contract on deposit with and held by said Trustee under said mortgage; that under date of April 30, 1908, The Hocking Valley Railway Company entered into a trust agreement with said Central Trust Company of New York, as Trustee, whereby all said stock was, subject to the lien of said first consolidated mortgage, conveyed to said Trust Company, in trust to dispose of the equity in said stock, subject to the lien of said mortgage and the rights of said trustee thereunder, when and as directed in writing by the holders or owners of record of a majority in amount of the stock of The Hocking Valley Railway Company; that The Chesapeake and Ohio Railway Company now owned more than a majority of the stock of The Hocking Valley Railway Company, and was therefore entitled under said trust agreement last mentioned to give directions for the disposal of said equity in said stock; that by said mortgage, The Buckeye Coal and Railway Company

conveyed certain real estate in said mortgage described, as further security for the payment of said mortgage bonds, and among other things agreed to pay the said Trustee thereunder, a sum equal to two cents a ton on all coal mined from the property of The Buckeye Coal and Railway Company so mortgaged, to be applied in purchasing bonds secured by said mortgage; and that The Hocking Valley Railway Company and The Chesapeake and Ohio Railway Company desired to procure the release of said stock of The Buckeye Coal and Railway Company from the lien of said first consolidated mortgage, and desired to effect the sale thereof, and said John S. Jones desired to purchase the same, upon the terms and conditions in said contract provided.

And thereupon, and in consideration of the premises so recited, it was in and by said contract agreed by and between said parties that The Hocking Valley Railway Company should forthwith make due application to said Trustee under said mortgage to release from the lien thereof said stock of The Buckeye Coal and Railway Company, in accordance with the provisions of said mortgage; that the Chesapeake and Ohio Railway Company, as owner of more than a majority of the outstanding stock of The Hocking Valley Railway Company, should take due action to procure the sale by The Hocking Valley Railway Company and by said Trustee under said trust agreement of April 30, 1908, of said stock of The Buckeye Coal and Railway Company, and that the action so provided for having been taken and said stock delivered to said Jones, together with resignations of all officers and directors requested by him, said Jones would pay simultaneously with such delivery, to this respondent as Trustee, in cash, in respect of said stock of The Buckeye Coal and Railway Company the sum of \$50,000, said stock to be delivered to said Jones endorsed in blank for transfer.

Said stock of The Buckeye Coal and Railway Company, agreed to be sold as aforesaid, was so sold for said price of \$50,000, in consideration of the facts so recited that said property was encumbered as aforesaid, an abatement being made on that account in the price that otherwise said stock would have sold for, as without said encumbrance of said property said stock would have been

of much greater value; all of which said Jones then well knew.

And in further consideration of said sale to him as aforesaid, said Jones in and by said contract further agreed that he thereby waived and released any and all claims of every character against The Hocking Valley Railway Company, The Chesapeake and Ohio Railway Company, or this respondent, by reason of any liability or claim which might be asserted by said The Buckeye Coal and Railway Company by reason of any matter or thing in connection with the ownership of said stock or the management of said company from the organization thereof to the date of the delivery of said stock under said agreement.

And The Hocking Valley Railway Company and The Chesapeake and Ohio Railway Company, in and by said contract, did waive and release any and all claims of every character and description against said The Buckeye Coal and Railway Company and said purchaser, or either of them, by reason of any liability or claim which might be asserted by The Hocking Valley Railway Company, The Chesapeake and Ohio Railway Company, or either of them, against The Buckeye Coal and Railway Company, by reason of any matter or thing whatsoever occurring to the date of said agreement; except, it was therein provided, that nothing contained in said agreement was intended or should be construed in any wise to limit or affect or impair the several covenants or obligations of The Buckeye Coal and Railway Company contained in said first consolidated mortgage.

And it was further agreed in and by said contract that if The Hocking Valley Railway Company should at any time default in the payments or obligations imposed on it by said consolidated mortgage, and said mortgage should be enforced or foreclosed in any way or to any extent, The Hocking Valley Railway Company would cause all the property of The Hocking Valley Railway Company to be first exhausted before any recourse is had under said mortgage to the property of The Buckeye Coal and Railway Company, and agreed to indemnify and to save and to hold harmless said The Buckeye Coal and Railway Company from any loss or damage to or payment of said The Buckeye Coal and Railway Company,

under the provisions of said mortgage, save only said two cents a ton above mentioned.

And said parties to said contract therein mutually agreed that said contract should inure to the benefit of and be binding upon the parties thereto, and their respective successors and assigns.

Said order in this suit of May 19, 1916, to comply with which said sale was negotiated by The Hocking Valley Railway Company, required that said contract should be, and it was expressly made, subject to the approval of this court; and in pursuance of that requirement, the parties to said contract appeared in this suit for that purpose, and duly submitted said contract to this court and thereupon, by its order of October 7, 1916, this court found that said purchaser was satisfactory to the court, and that said sale complied with said order entered May 19, 1916, and that the terms of said contract of sale were, and the amount of cash paid for said stock was, such as to fully protect the interests of this respondent as such Trustee, and that the price proposed to be paid for said stock was the reasonable value thereof, and thereupon it ordered that said sale and the terms thereof as embodied in said contract be, and the same thereby were, approved, and that this respondent as such trustee, upon due application to it in accordance with the terms of said first consolidated mortgage, as provided in said contract, release said stock from the lien of said mortgage upon the payment to it of the purchase price thereof; which said order was duly entered in said cause November 10, 1916, upon the dismissal of the appeal taken by this respondent from said order of May 19, 1916, and thereupon on or about said November 10, 1916, said sale was consummated in accordance with the terms and conditions of said contract.

21. On or about April 17, 1919, said John S. Jones, having theretofore acquired as aforesaid all the capital stock and securities of The Buckeye Coal and Railway Company and of two other corporations known respectively as Sunday Creek Coal Company of New Jersey and the Ohio Land and Railway Company, in order to bring about a consolidation of the properties of said companies under one corporation, caused the respondent The Sunday Creek Coal Company to be incorporated under

the laws of Ohio, and on or about May 1, 1919, in order to effect such consolidation, caused each of said three corporations in this paragraph first named to convey, and they each did convey, all of their respective properties to said The Sunday Creek Coal Company for a nominal consideration, in consideration of the fact that the latter company exchanged with said John S. Jones all its capital stock for said stock and securities of said three other companies; which conveyance of The Buckeye Coal and Railway Company included the lands owned by that Company and mortgaged under said first consolidated mortgage, said lands being situate in the counties of Hocking, Perry and Athens in the state of Ohio.

22. Among the covenants and provisions of said first consolidated mortgage the following are made and provided in Article Ten thereof, The Hocking Valley Railway Company being therein referred to as the Railway Company and The Buckeye Coal and Railway Company as the Coal Company:

"Section 1. All the covenants, stipulations, promises and agreements in this indenture contained, by or in behalf of the Railway Company or of the Coal Company, severally and respectively, shall bind such Company, its successors and assigns, whether so expressed or not.

Sec. 2. Nothing contained in this indenture or in any bond hereby secured, shall prevent any consolidation, or merger of the Railway Company or of the Coal Company with each other or with any other corporation or any conveyance and transfer, subject to the continuing lien of this indenture and to all the provisions hereof, of all the mortgaged and pledged premises as an entirety to a railroad corporation at that time existing under and by virtue of the laws of any state or states, and entitled to acquire the same; provided, however, that such consolidation, merger or sale shall not impair the lien and security of this indenture, or any of the rights or powers of the Trustee, or of the bondholders hereunder, and that upon such consolidation, merger or sale, the due and punctual payment of the principal and interest of all of the said bonds according to their tenor, and the due and punctual performance and observance of all the covenants and conditions of this indenture, shall be assumed by

the corporation formed by such consolidation or merger, or purchasing as aforesaid."

23. From and after March 1, 1916, The Buckeye Coal and Railway Company continued to own (subject to said mortgage) said lands referred to in Section 9 of Article Two of said mortgage, and to mine or cause to be mined coal therefrom, up to the time of its said conveyance of May 1, 1919; and thereafter The Sunday Creek Coal Company, as its successor and assign as aforesaid, continued to own said lands, subject to said mortgage, and to mine or cause to be mined coal therefrom up to the present time, and is continuing so to do; yet said companies, and each of them, have failed and refused to deliver to the respondent the statements required by said Section 9, and also have failed and refused to pay to this respondent a sum equal to two cents a ton on all coal mined from said lands since March 1, 1916, or any part thereof; and respondent has pending in this court, on the equity side thereof, a suit of docket number 110, to recover the same.

24. On or about April 21, 1919, said The Buckeye Coal and Railway Company, as plaintiff, commenced a civil action against this respondent and The Hocking Valley Railway Company, as defendants, in the Court of Common Pleas of said county of Perry, to quiet its title to said lands, being case No. 5895 in said court. On or about November 12, 1919, The Sunday Creek Coal Company had itself made a party plaintiff to said action, and thereupon entered its appearance therein as such plaintiff, and thereafter participated as such a plaintiff in the litigation. In said cause, and upon the pleadings therein, there was an issue between the parties as to the validity of said mortgage and covenants, and upon the trial thereof, the Court of Common Pleas by its judgment upon the merits duly given and entered on or about January 8, 1920, found and adjudged the same against the plaintiffs therein and in favor of the defendants therein, sustaining the validity of said mortgage and covenants.

Thereupon, the plaintiffs in said action appealed said cause to the Court of Appeals for said county, being case No. 70 in that court, and at the trial of said cause upon appeal, upon the same issues, said Court of Appeals by its judgment upon the merits duly given and entered on

or about March 4, 1921, found and adjudged the same in favor of the defendants therein and against the plaintiffs therein, and did order, adjudge and decree that said first consolidated mortgage and the covenants of The Buckeye Coal and Railway Company therein contained are valid and binding obligations, and a good and valid lien upon the real property in said mortgage described, and that the petition of the plaintiffs therein be and the same was dismissed upon the merits, with costs; and the plaintiffs therein having thereupon filed a motion for a new trial, said Court of Appeals, on consideration thereof, overruled said motion; to all of which the plaintiffs therein did except and take their bill of exceptions thereto.

Thereafter on or about May 5, 1921, the plaintiffs in said cause, filed their motion in the Supreme Court of Ohio, which was given case No. 17047 in that court, for an order directing said Court of Appeals to certify the record in said cause to the Supreme Court for review; on consideration whereof, said court on or about June 7, 1921, overruled said motion; and said judgment and proceedings of said Court of Appeals are in full force and unreversed and are res judicate and conclusive upon the parties to said suit as to the validity of the mortgage and the covenants aforesaid.

Wherefore, respondent prays that said petition may be dismissed, for costs and all proper relief.

Central Union Trust Company of New York,

By Larkin, Rathbone & Perry,

Its Solicitors.

Arthur H. Van Brunt,
Of Counsel.

DOCKET ENTRY.

June 8, 1923. Argued and submitted on supplemental petition of United States of America.

OPINIONS.

[Filed January 18, 1924]

In the year 1912 the United States began suit in equity herein against six railroad companies and three coal companies, named in the margin hereof, to dissolve a combination alleged to violate the Sherman anti-trust act (July 2, 1890, c 647, 26 Stat. 209). Our decree of March 14, 1914, declared the combination to be in violation of the Act, and ordered dissolution by the sale of

the railway companies' interests in the stock of the Sunday Creek Company, the disposition of stock in the Kanawha & Michigan Railway Company, and otherwise, including the enjoining of the Lake Shore & Michigan Southern, the Toledo & Ohio Central, the Hocking Valley and the Chesapeake & Ohio Railroad Companies from owning or controlling any stock in the Sunday Creek Company, or any interest in any of the coal properties in which that company is interested. Jurisdiction of the cause was expressly retained by the decree for the purpose of making such other and further orders and decrees as might be necessary to the due execution of the decree of 1914, and the complete dissolution of the combination condemned thereby.

1. The Lake Shore & Michigan Southern Railway Company, the Chesapeake & Ohio Railway Company, the Hocking Valley Railway Company, the Toledo & Ohio Central Railway Company, the Kanawha & Michigan Railway Company, the Zanesville & Western Railway Company, The Sunday Creek Company, the Continental Coal Company, the Kanawha & Hocking Coal & Coke Company. A detailed history of the case will be found in the opinion of this court upon which that decree was based. *United States v. L. S. & M. S. Ry. Co.*, et al., 203 Fed. 295. Under that retention, orders have been made from time to time, as deemed necessary, to effectuate dissolution.

When that decree was made the Hocking Valley Railway Company owned the entire of the capital stock of the Buckeye Coal & Railway Company (consisting of 2500 shares), all of which except five qualifying shares were held in pledge by the Central Trust Company, as trustee under the Hocking Valley Railway Company's First Consolidated Mortgage of 1899, by which mortgage the Buckeye Company had conveyed certain coal lands as further security for the payment of the Hocking Valley Railway Company's bonds secured by that mortgage, by the terms of which the Buckeye Company agreed to deliver, beginning July 1, 1900, yearly statements of coal mined, and to pay two cents per ton on such coal, to be used as a sinking fund for the purchase and cancellation to that extent of the mortgage bonds of the Hocking Valley Company.

On May 19, 1916, upon application of the United States this court made an order that the capital stock of the Buckeye Company be sold free and clear of the mortgage lien, and that the proceeds thereof be paid to the mortgage trustee to apply on the mortgage bonds (281 Fed. 1007). Under that order the Buckeye Company stock was sold to John S. Jones for \$50,000 (in connection with the sale to him of the outstanding stock and bonds of the Ohio Land & Railway Company for \$400,000), the sale being approved by this court upon presentation of the contract of sale between Jones, on the one part, and the Hocking Valley and Chesapeake & Ohio Railway Companies, on the other, and after taking the testimony of witnesses in open court relating to conformity of such sale to the order of May 19, 1916, the reasonableness of the price paid, and the satisfactory status of the purchaser—the mortgage trustee in connection therewith waiving its then pending appeal to the Supreme Court from the order of May 19, 1916. The contract between Jones and the railroad companies contained a recital of the inclusion in the Hocking Valley mortgage of the Buckeye real estate as such further security for the payment of the mortgage bonds, as well as the agreement in the mortgage for the payment by the Buckeye Company of the two cents per ton royalty on coal mined from its property so mortgaged. This recital was followed by express provision that the Hocking Valley Company should cause all the mortgaged property of that company to be first exhausted before any recourse under the mortgage to the property of the Buckeye Company; and that the Hocking Valley Company indemnify the Buckeye Company from any loss or damage to or payment by that company under the provisions of the mortgage "save only said two cents per ton royalty above mentioned," and that nothing contained in said agreement was intended or should be construed in any-wise to limit, or affect or impair, the several covenants or obligations of the Buckeye Coal & Railway Company contained in said mortgage.

After the purchase by Jones (who owned and owns all the Buckeye stock), the Buckeye Company failed and refused to carry out the provision for royalty payment. The mortgage trustee began suit in this court, in the

year 1919, for the collection thereof, which suit is still pending and undetermined. In the same year the Buckeye Company instituted suit in a state common pleas court of Ohio to quiet its title against the claims of the mortgage trustee under the Hocking Valley mortgage. The Sunday Creek Coal Company of Ohio (not the original Sunday Creek Company), which had succeeded to the rights of the Buckeye Company in the lands, was made a party plaintiff. Upon final hearing upon issues joined, the Common Pleas Court dismissed the petition, adjudging that the mortgage "and the covenants of the Buckeye Coal & Railway Company therein contained, are valid and binding obligations, and a good and valid lien upon the real property in said mortgage * * * described." This decree was affirmed by the State Court of Appeals, the Supreme Court of Ohio declining to order the case certified for its review. Thereupon the Buckeye Company and the Sunday Creek Coal Company filed their petitions in this court, asserting that the situation created by the Hocking Valley trust mortgage, including especially the two cents per ton royalty provision, was in violation of the decree of dissolution previously made by this court; and asking that the demand or collection of the two cents per ton royalty be enjoined, the lands of the Buckeye Company released from the mortgage, and particularly from section 9 thereof (which contains the royalty provision), or that all interests of the railway company and the mortgage trustee in the Buckeye property be sold, or such other and appropriate order as will "effectively carry out the purpose and effect" of the decree of 1914. After issues joined on the petition, and before decision thereon, the United States filed its supplemental petition herein, asking that the Buckeye coal lands be released from the lien of the Hocking Valley mortgage and the Buckeye Company discharged from its obligation to pay the two cents per ton royalty, upon payment by the Buckeye Company, or its successors in interest, to the Hocking Valley's mortgage trustee the reasonable value of the rights of the trustee, to be judicially ascertained; and on the ground that the situation created by such lien and royalty provision violates the anti-trust act and contravenes the original decree of dissolution made herein. It will be observed that the

substantial difference between the petitions of the coal companies and the Government, respectively, is that the one asks such release without, the other upon, compensation to the mortgage trustee.

So far as concerns the petition of the Buckeye Company and the Sunday Creek Company, we think it clear that relief should be denied. While our jurisdiction generally to make such further orders and decrees as should be necessary to the due execution of our main decree, and the complete dissolution of the condemned combination, continued without abatement until such complete dissolution should be affected (*United States v. L. S. & M. S. Ry. Co. et al.*, *supra*), there is perhaps substantial force in the thought that the order of this court of May 19, 1916, and the sale of the Buckeye Company's stock thereunder, exhausted the jurisdiction of this court over the specific question whether the situation created by the lien of the Hocking Valley mortgage upon the Buckeye Company's lands, given to secure the Railroad's indebtedness, in connection with the tonnage royalty provision, was so far unlawful as to require its elimination. This court approved the sale of the stock to Jones with full knowledge of the fact situation now complained of, and presumably without its occurring to either court or Government's counsel that the situation created a substantial interference with the free competition aimed at by the original decree. The action taken might not improperly be thought to carry a tacit implication that the situation here presented was not then regarded open to criticism. But wholly apart from this consideration, and without passing upon its merits, we think relief forbidden by these further considerations: In the first place, assuming for the purposes of this opinion, that the petitioning coal companies have a legal interest in the elimination of the alleged unlawful feature, we see no reason to doubt that, as between the two original petitioners and the Hocking Valley Company and its mortgage trustee, the decree of the state court binds both the Buckeye Company and the Sunday Creek Company as an adjudication of the complete validity of the mortgage as against the attacks now made upon it. Again, this is a proceeding in equity, and it is manifestly inequitable that either Jones or those

standing in his right escape liability for a situation assumed by them, and, as we must find, then recognized as of binding force, and whose assumption seems fairly to have been part of the consideration paid by Jones for the Buckeye stock. In the situation presented, we think the petitioning coal companies cannot be heard to say that payment of the royalty, or the continuance of the mortgage lien upon the lands of the Buckeye Company, would violate the law. The fact that the Government did not answer or take issue upon the coal companies' petition cannot alter the result otherwise reached. The petition of the coal companies must be denied.

The Government's supplemental petition rests upon a different foundation. It is conceded that the decision of the Supreme Court in the Reading case (*Continental Coal Co. v. United States*, 259 U. S. 156), announced about six years after the sale to Jones of the Buckeye stock, and shortly before the filing of the Government's supplemental petition before us, suggested to Government's counsel the invalidity of the situation we are considering. It was eminently proper that the Government bring this situation before the Court, and afford opportunity for such action, if any, as should seem to be called for. But we are not impressed that the situation calls for the relief asked. Again passing without decision the question of the exhausting of jurisdiction of this court over the subject-matter of the supplemental petition, by the action had in the sale to Jones, it seems plain that even in view of the Reading decision the criticized situation is not so clearly improper, nor so substantial, as to justify the action which the Government now asks. Whatever theoretically potential interference with free competition might otherwise be created by the railroad-mortgage lien upon the Buckeye lands in connection with the royalty tonnage provision, we think such interference practically reduced to a minimum by the fact that by the contract between Jones and the railroad companies the railroad property must first be exhausted before resort can be had to the coal lands, in connection with the fact that no suggestion is made that the railroad property is not entirely adequate to meet the payment of the mortgage in full, and the payment of the mortgage puts an end to the royalty. Indeed, an affirmative in-

ference, more or less strong, in favor of the adequacy of the railroad security seems fairly deducible from the record presented to us. We therefore think that it will be time enough to question the invalidity of the situation we are discussing when, if ever, it becomes acute.

We are accordingly constrained to dismiss the Government's supplemental petition. The dismissal, however, will be without prejudice to its right to make further application for relief, when, if ever, the situation may be thought to justify it, in view of the considerations we have stated.

Approved:

L. E. Knappen,
U. S. Circuit Judge.

A. C. Denison,
U. S. Circuit Judge.

A. M. J. Cochran,
U. S. District Judge, sitting by designation.

ENTRY.

[Filed January 18, 1924.]

The petition of the Buckeye Coal and Railway Company and the Sunday Creek Coal Company of Ohio, asking that the demand or collection of the two cents per ton royalty on coal mined as set forth in the opinion of this court, filed contemporaneously with this order, be enjoined, and the lands of the Buckeye Company released from the mortgage given by the Hocking Valley Railway Company to the Central Trust Company of New York, also referred to in said opinion, having been duly heard; as well as the supplemental petition of the United States of America, asking that the lands of the Buckeye Coal & Railway Company be released from the lien of said mortgage, and that company discharged from its obligation to pay the royalty referred to, upon payment by the Buckeye Coal & Railway Company, or its successor in interest, to the mortgage trustee of the Hocking Valley Railway Company (Now the Union Central Trust Company of New York), the reasonable value of the rights of that trustee to be judicially ascertained;

It is ordered: That the petition of the Buckeye Coal & Railway Company be and is hereby denied and dismissed.

It is further ordered: That the supplemental petition of the United States be likewise dismissed, but without prejudice to its right to make further application for relief when, if ever, the situation may be thought to justify it, in view of the considerations stated in the opinion of this court hereinbefore referred to.

Dated, January 18, 1924.

L. E. Knappen,

U. S. Circuit Judge.

A. C. Denison,

U. S. Circuit Judge.

A. M. J. Cochran,

U. S. District Judge, designated to sit by reason of the disqualification of the three Circuit Judges of the Circuit.

ENTRY.

[Filed February 11, 1924.]

The order of this court, dated January 18, 1924, made upon consideration of the petition of the Buckeye Coal and Railway Company and The Sunday Creek Coal Company of Ohio, as well as the supplemental petition of the United States, is hereby amended by substituting the paragraph—

“It is ordered; that the petition of the Buckeye Coal and Railway Company and The Sunday Creek Coal Company of Ohio be and is hereby denied and dismissed.” in the place and stead of the paragraph: “It is ordered, that the petition of the Buckeye Coal and Railway Company be and is hereby denied and dismissed.”—the name of the Sunday Creek Coal Company of Ohio having been inadvertently omitted from said paragraph as contained in the original order.

L. E. Knappen,

U. S. Circuit Judge.

A. C. Denison,

U. S. Circuit Judge.

A. M. J. Cochran,

U. S. Circuit Judge, sitting by designation.

OPINIONS.

Decided December 28, 1912.

Before Warrington, Knappen and Denison, Circuit Judges.

Warrington, Circuit Judge. This suit was brought to enjoin further performance of certain agreements alleged to have been made in pursuance of combinations and conspiracies formed and carried out in restraint of trade among the several states, particularly trade in bituminous coal, in violation of the Act of Congress of July 2, 1890, commonly known as the Sherman Anti-Trust Act; many of the acts alleged having been committed in whole and others in part within the Eastern Division of the Southern Judicial District of Ohio.

The defendants consist of six railroad companies and three coal companies named in the margin.¹ The railroad companies are all Ohio corporations, except the Chesapeake & Ohio, which was organized in Virginia, and all are engaged in transporting interstate commerce. The coal companies named were created as follows: the Sunday Creek under the laws of New Jersey, and the other two under the laws of West Virginia.

The Railroads. It is important to understand the geographical relations of the railroads, and similarly their relations to the coal fields involved. The Lake Shore extends from Buffalo to Chicago, passing through Ohio near the southerly shore of Lake Erie to Toledo and thence across the northerly portion of the state, and has a number of intermediate branches. A large majority of its capital stock is owned by the New York Central. The Chesapeake & Ohio extends from Old Point Comfort to Cincinnati, running generally along the south side of the Ohio River from a point east of Huntington, West Virginia, to and through Kentucky to Cincinnati, and also has a number of intermediate branch lines. It owns a great

¹The Lake Shore & Michigan Southern Railway Company, The Chesapeake & Ohio Railway Company, The Hocking Valley Railway Company, The Toledo & Ohio Central Railway Company, The Kanawha & Michigan Railway Company, The Zanesville & Western Railway Company, Sunday Creek Company, Continental Coal Company, Kanawha & Hocking Coal & Coke Company.

majority of the stock of the Chesapeake & Ohio Railway of Indiana, and so reaches Chicago. Thus, one of these east and west trunk lines passes through Ohio near its northerly boundary, and the other along the south shore of the Ohio River near the south boundary of Ohio. Two of the remaining defendant railroads are wholly within Ohio, running generally in a north and south direction, viz., the Hocking Valley from Toledo by way of Columbus, Lancaster, Logan and Gallipolis, to Pomeroy on the Ohio River (passing through Kanauga on the Ohio River opposite Point Pleasant, W. Va.), with a branch line running from Logan to Athens; and the Toledo & Ohio Central has two divisions running from Toledo, one by way of Fostoria, Bucyrus and Thurston to Corning in Perry County, and the other by way of Findlay, Kenton and Columbus to Thurston on the First Division. The Kanawha & Michigan runs south from Corning to the Ohio River, crossing the river from Kanauga, Ohio, to Point Pleasant, West Virginia, and continuing thence through Mason, Putnam, Kanawha and Fayette counties by way of Charleston to Gauley Bridge in that state, using the tracks of the Hocking Valley between Hobson and Gallipolis, by way of Kanauga; and the Zanesville & Western runs east and west from Thurston through the counties of Fairfield, Perry and Muskingum to Zanesville, Ohio, although it seems to be part of an old road which formerly continued westwardly from Thurston to Columbus, parallel with the Hocking Valley.

The Coal Fields. The Ohio coal fields directly in question are situated in Athens, Perry, Hocking and Muskingum counties and known as the Hocking Valley Coal Fields; and those in West Virginia are situated in the Kanawha coal district. The four railroads last named are connected with portions of these coal fields of Ohio, and the Kanawha & Michigan with the Kanawha coal fields. The principal coal mines along the Hocking Valley are located in Athens, Perry and Hocking counties; those along the Toledo & Ohio Central are in Fairfield, Perry, Hocking, Athens and Muskingum; those along the Zanesville & Western are in Muskingum and Perry counties; and those along

the Kanawha & Michigan are in Putnam, Kanawha and Fayette counties, West Virginia, besides some that are located in Perry and Athens counties, Ohio; and the principal part of the freight traffic of all the defendant railroad companies, except the Lake Shore, is bituminous coal in carload shipments, the principal mines along the Chesapeake & Ohio being in Kanawha, New River and Big Sandy districts of West Virginia and Kentucky. A large part of the freight traffic of the Lake Shore is bituminous coal in carload shipments derived from branch roads tapping the Appalachian coal fields. The coal of the various fields mentioned is shipped on these roads from the portions of coal fields with which they are severally connected as before pointed out, to lake ports and to points in the North and Northwest.

Competitive Conditions. The Hocking Valley and the Toledo & Ohio Central, when the latter and the Kanawha & Michigan are operated as they were for a long time as a through line, are naturally competing roads; however, evidence was offered to show that the river division of the Hocking Valley, running from Logan to Kanauga (and thence to Pomeroy, as stated), cannot be treated as a competitor of the Kanawha & Michigan because of difficult grades on such river division. The Hocking Valley, as far south as Athens, and the Toledo & Ohio Central, are naturally competing roads. It is to be noted, however, that claim is made that competing relations cannot be ascribed to roads connected as these all seem to be with different sets of coal mines, even where such mines are located in the same coal field. As it seems to us, a broader view than this must be taken. The destinations of the coal shipped from these coal fields and the effect on the prices to be exacted of the coal purchasing and consuming public located at points beyond the lake ports and the boundaries of Ohio, must be taken into consideration; and not merely the producers of coal and the carriers transporting it. Manifestly it can make no difference to the coal purchaser or consumer whether coals of the same quality be derived from one particular mine or another of the same field, no matter how close together or how far removed from

one another such mines may be, so long as the prices of the coals and the freight charges to be paid are influenced by natural competitive conditions both at the mines and in transportation; and the right to have such conditions maintained cannot be validly abridged through arbitrary or unusual methods. This is equally plain respecting coals of different qualities originating in different fields and requiring varying distances of transportation over lines naturally competing in material parts; for the purchaser or consumer will obviously select the coal according to his particular needs or ability to sell or to pay.

It must follow that mere differences in locations of coal mines within the same general field, as well as differences in quality owing to differences in fields, cannot rightfully be made the basis for eliminating effective competition as between railroads traversing substantially the same territory along parallel lines from neighboring mines of the same coal field, or even of different coal fields, to the same general destinations; and the evil effects upon competition concerning railroads and coal mines so related, are accentuated wherever a union of interests is created and maintained between such producers and carriers of coal, particularly where producers and carriers through artificial methods become practically one and the same. If these views are at all applicable to a case such as this, the Kanawha & Michigan, when employed as a carrier exclusively in connection with either the Toledo & Ohio Central or the Hocking Valley, may, we think, be safely treated as a natural competitor of the one or the other of such roads, according as the connection may exist; because the destinations of its coal in either event are, in any rational competitive sense, the same as those of the other road respecting the coal originating on its line. It results (1) that traffic originating on either the Hocking Valley or the Toledo & Ohio Central should be accorded the benefits of free competition; (2) that when coal originating on the line of the Kanawha & Michigan is carried in part over both of these other roads to destinations beyond Ohio, as also coal originating on that road in West Virginia and destined to common points within Ohio,

it is to the interest of the Kanawha & Michigan actually to make and employ the legitimate advantages arising from its opportunity to forward such coal (and this forms the great bulk of its traffic) over either of the other roads. The issue in a general sense is, whether these competitive conditions have been suppressed; and the situation is further complicated by uniting coal interests with the railroad interests proper.

Combination and Conspiracy—Alleged Origin and Continuation. The combination and conspiracy averred originated in 1899 and have as alleged been continued in one form or another ever since. What happened between that time and the year 1909 resulted in a suit in quo warranto by the State of Ohio against the Hocking Valley. State, ex rel., vs. Railway, 12 O. C. C. (N. S.) 49, 145. The first decision in that case was rendered April 24, 1909, and upon rehearing adhered to July 21 of that year; and on January 18, 1910, the court made a finding of facts, with separate conclusions of law thereon (set out in the present record), in terms ousting the Hocking Valley from the power of owning and holding shares of stock in the Kanawha & Michigan, the Buckeye Coal & Railroad Co., the Sunday Creek Coal Co., the Sunday Creek Co., and the Continental Coal Co.; from the power of guaranteeing bonds of the Continental Coal Co.; from exercising control or management of the Kanawha & Michigan, the Toledo & Ohio Central, the Zanesville & Western, and the coal companies before mentioned; and from performing a certain contract between it, the Toledo & Ohio Central, and the Continental Coal Co., for division of freight between such railroads. It was adjudged also that the road of the Toledo & Ohio Central for its entire length is parallel to and competitive with the road of the Hocking Valley from Toledo to Logan; that the roads of the Hocking Valley and the Kanawha & Michigan are parallel lines between Logan and Corning respectively and the Ohio River, and that the Kanawha & Michigan and Toledo & Ohio Central together, are competitive with the entire line of the Hocking Valley. This judgment was allowed to become final.

In March following the Lake Shore and the Chesapeake & Ohio entered into an agreement (sometimes referred to by the parties as the Schaff-Stevens agreement and sometimes as the agreement of March 12, and again of March 17), which has become the subject of a controlling issue in the present cause. Indeed, the government's position is that the operation and effect of this agreement, with what has been done under it, have been to continue the scheme so condemned by the judgment of the Ohio Circuit Court; while that of the defendants is that the agreement is valid, and that the acts of the parties thereto and of all the other defendants, since the date of the agreement, have in nowise been repugnant to any Federal statute. It is not claimed that the issues determined in the state quo warranto suit are decisive of issues concerning interstate commerce; but it is urged that, apart from the state case, interpretation of the March agreement and of the conduct of the parties to it and those directly affected by it, is distinctly aided by looking into the conduct of those who were interested in the properties before the agreement; stated otherwise, the contention is that a view of the situation existing before the agreement and of the situation that has since existed cannot but be helpful to a proper solution of the controversy.

We do not propose to recite or discuss all the details of either situation, for such a course would occupy far too much space, and, moreover, is not necessary. If the locations and connections of the railroads and their relations to the coal properties are recalled, as before pointed out, it will not be difficult to apply the controlling features of the evidence adduced on the one side to prove, and on the other to disprove, the alleged combination and conspiracy and continuation thereof. In 1899 a plan for the reorganization of the Columbus, Hocking Valley & Toledo Railway Company (predecessor of the Hocking Valley) was entered into under date of January 4, and direction of J. P. Morgan & Co. After judicial sale of the railroad property of the company, the purchasing trustees at such sale conveyed this property to the Hocking Valley and the title thereto is still in that company. It was part

of this plan to have the Hocking Valley acquire interests in the Toledo & Ohio Central and the Columbus, Sandusky & Hocking Railroad companies, or successor companies, and in February, 1899, the stockholders of the Hocking Valley adopted a regulation reserving 50,000 shares of its preferred and 50,000 shares of its common stock for the purpose of acquiring such interests. These reserved shares were from time to time listed on the New York Exchange at the instance of the Hocking Valley and for the express purpose of acquiring such interests. The purchases of the stock in the Toledo & Ohio Central were made in the name of a New Jersey corporation, called the Middle States Construction Company, which was organized in February, 1899, for that purpose. In 1899 and 1900 the Hocking Valley, through the issue of over \$8,000,000 of its reserved preferred and common stock, purchased the bonded indebtedness of this construction company; and this indebtedness was secured by and convertible into the stock of the Toledo & Ohio Central, under a deed of trust of the Construction Company to the Central Trust Company of New York. Through the issue of the remainder of its reserved stock, the Hocking Valley, in 1902, purchased all the stock in and all the bonds of the Zanesville & Western, which through judicial sale had acquired the portion of the Columbus, Sandusky & Hocking Railroad extending from Thurston in Fairfield county to Zanesville in Muskingum county, with certain branch lines. It is not definitely shown when and in what amounts the purchases of the stock in the Toledo & Ohio Central were made; but it appears by stipulation that the Construction Company, in the years 1899 and 1900, acquired 58,921 shares of such stock; and the listing papers before mentioned show that the total issue of stock of the Toledo & Ohio Central was 102,080 shares, preferred and common. Moreover, from 1902 to 1909 the president and general manager of the Hocking Valley, not to speak of other officers selected later, occupied corresponding positions in the Toledo & Ohio Central and the Zanesville & Western. The control thus signified in the Hocking Valley, carried with it also the control of the Kanawha & Michigan. In 1890 the To-

ledo & Ohio Central acquired 45,000 shares, and in 1899 an additional 100 shares of the capital stock of the Kanawha & Michigan, constituting a majority of that company's outstanding capital stock, and these two roads were operated practically as a through line; and, further, as early as February, 1891, the former guaranteed the one hundred year bonds of the latter at the rate of \$10,000 a mile for 134 miles, or \$1,340,000, and thereafter advanced it moneys from time to time. Further, in 1903, the Hocking Valley exchanged its holdings of stocks and bonds in the Zanesville & Western for the shares held by the Toledo & Ohio Central in the Kanawha & Michigan. Thus the Hocking Valley attained practical control of the two parallel systems of railroad between Toledo and the Ohio River, including the Zanesville & Western; and, apart from influence exerted by certain trunk lines alluded to later, the Hocking Valley alone remained in control of this entire system of railroads until the execution of the agreement of March 12, 1910.

We shall gain a better knowledge of the situation as it existed prior to the March agreement, if at this point we look further into the coal fields, which were tributary to this system of roads and especially into certain portions of such fields that were under the practical control of the Hocking Valley. Much evidence was offered upon this subject, and some of it is clarified by admissions contained in some of the pleadings. By several methods the Hocking Valley obtained control of large coal properties both in the Hocking and Kanawha fields. Pursuant to the plan of reorganization of 1899, that company and the Buckeye Coal & Railway Company were incorporated under the laws of Ohio, February 25, 1899, and thereafter they joined in the execution of a mortgage under date of March 1 following, providing for the issue of first mortgage bonds in the sum of \$20,000,000, and secured by the properties acquired by such companies. This coal company was organized for the purpose of acquiring the coal properties of the Hocking Coal & Railroad Company, and these properties were bid in and conveyed to the Buckeye Coal & Railway Company by the purchasing trustees at the judicial sale; and such trus-

tees received from the new coal company 2495 shares of its total capital stock of 2500 shares, and thereupon entered into a traffic agreement with the Hocking Valley to secure rail connection between coal mines and the main railroad line and also coal transportation, and the trustees at the same time turned over the stock in the coal company to the Hocking Valley. Out of the sales proceeds of the first mortgage bonds mentioned, the Hocking Valley acquired the stock and properties of the Ohio Land & Railway and the New York & Western Coal Companies, which had belonged to and been controlled by the Columbus, Hocking Valley & Toledo Railway Company; also all the stock in the Boston Coal, Dock & Wharf Company and the Rabould Coal Company; also a majority of the preferred and likewise of the common stock of the Sunday Creek Coal Company, and afterwards the Hocking Valley increased its holdings in that company to 12,963 shares of preferred and 19,400 shares of common out of a total issued of 15,000 shares of preferred and 22,500 of common.

A different method was adopted for securing control of the Kanawha Hocking Coal & Coke and the Continental Coal Companies, as also quite a number of other coal properties to which we shall refer in a moment. The Toledo & Ohio Central and the Hocking Valley entered into a contract to guarantee first mortgage bonds of the coal companies last named, the details of which are not essential to an understanding of the case. It suffices to state that agreements were made under which syndicates were formed to underwrite bonds of the companies (\$3,250,000 par value in all of the first company and \$3,023,000 par value in all of the second company); the Toledo & Ohio Central and the Hocking Valley guaranteeing payment of said bonds, but the Hocking Valley assuming the entire obligation as between it and the other guarantor company. In connection with these guaranties the coal companies agreed to deliver all their coal to the Kanawha & Michigan for transportation, and by further agreement such coal was to be equally divided between the Hocking Valley and the Toledo & Ohio Central and so carried northwardly and beyond the Ohio terminus of the

Kanawha & Michigan; and the Kanawha & Michigan agreed to purchase all its fuel coal from the coal companies at a price at least 20 cents per ton above production cost. The stock of these two coal companies and certain beneficial certificates of the first company were issued to J. P. Morgan & Co., to secure performance of these contracts of guaranty. The bonds so guaranteed were sold and large portions of the proceeds were used to purchase coal properties of 28 owners (consisting mostly of companies) at prices varying from \$8875.00 to \$541,125.00 and aggregating \$5,194,940.00. The remainder, after paying organization expenses, was placed in the treasuries of the coal companies. Further, the Toledo & Ohio Central owned the entire capital stock of the Imperial Coal Company and also the National Coal Company, the former being \$300,000 and the latter \$100,000 par value.

We are unable to discover from the evidence the acreage of these coal lands or their precise locations. An estimate made by the vice-president of the Sunday Creek Company, of its unmined coal acreage on December 31, 1910, showed that there were 42,710 acres in Athens, Perry and Hocking counties of Ohio and 33,000 in Kanawha and Fayette counties of West Virginia. But in July, 1905, the Sunday Creek Company (not the Sunday Creek Coal Company, another subsidiary company of the Hocking Valley) was organized under the laws of New Jersey with an authorized capital stock of \$4,000,000, for the purpose of engaging in business in the State of Ohio and owning and developing lands containing coal and other minerals. It is averred in the bill that the Sunday Creek Company controls more than 100,000 acres of land including about 50 mines and about 350 coke ovens, and owns the beneficial certificates of the Continental Coal Company and the Kanawha & Hocking Coal & Coke Company; and these averments are admitted in the answer of the Sunday Creek Company, as also in the joint answer of the Hocking Valley and the Chesapeake & Ohio; and the coal property held by the Sunday Creek Company seems to comprise all the coal properties so accumulated as before shown. At the time of the incorporation of the Sunday Creek Company the Hocking Val-

ley exchanged \$3,236,300 par value of the stock it held in the Sunday Creek Company for the same amount of stock of the Sunday Creek Company; and the Toledo & Ohio Central exchanged 2037 shares of the preferred and 3100 shares of the common stock it held in the Sunday Creek Coal Company for a like amount of the stock of the Sunday Creek Company. Thus the Hocking Valley and the Toledo & Ohio Central, in the proportions mentioned, acquired \$3,750,000 par value of the total of \$4,000,000 par value of the capital stock of the Sunday Creek Company; and on April 23, 1906, 2488 shares were ordered to be issued in a single certificate in the name of the Central Trust Company of New York to the end that they would not be issued except with its approval, the remaining 12 shares having apparently been issued as qualifying shares for directors.

The Trunk Lines' Purchase of a Majority of the Hocking Valley Capital Stock. Prior to the merger so made of the coal interests of the Hocking Valley, to-wit: June 29, 1903, five of the Trunk Line railroads, viz., Lake Shore & Michigan Southern Railway Company, Erie Railroad Company, Baltimore & Ohio Railroad Company, Chesapeake & Ohio Railway Company, and the Pittsburgh, Chicago, Cincinnati & St. Louis Railway Company, entered into an agreement with J. P. Morgan & Co. to purchase from the company 69,242 shares of common capital stock of the Hocking Valley at a price and upon terms specified; Morgan & Co. having "arranged to borrow the moneys forthwith to make payment for said shares to the depositors under a Syndicate Agreement dated December 4, 1902." Morgan & Co. were to carry the loan for the benefit of the purchasing companies for three years; and such purchase was completed. The aggregate purchase price was \$7,270,410, and each of the purchasing companies obtained one-sixth interest in the shares so purchased, except the P., C., C. & St. L., which acquired two-sixths. As indicative of the effect of this upon the policy of the Hocking Valley, it is sufficient to state that an advisory committee (composed of representatives of the Trunk Lines) and the president of the Hocking Valley had frequent conferences relative to

the financial affairs of the Hocking Valley and the coal companies in which it was interested, and the introduction or not of track connections between the lines of the Hocking Valley system and the independent coal mining operators and the like. Among the results of these conferences were the incorporation of the Sunday Creek Company for the purpose of handling the coal interests of the Hocking Valley, as before pointed out, and an operating system that was satisfactory to the Trunk Lines. One of the features of this operating system was to restrict rail connections with coal mines to such as were already in operation and to refuse and by litigation to contest applications for rail connections with new mines. These conditions were in practical effect and continued until the agreement of March, 1910.

Shares of Capital Stock in the Sunday Creek Company Placed in Names of Trustees. It should be added here that when the Sunday Creek Company was organized, the 5137 share of stock in that company, which belonged to the Toledo & Ohio Central, were issued in one certificate in the name of John H. Doyle, as trustee; who endorsed the certificate in blank and delivered it to the Vice-president and General Manager of the Toledo & Ohio Central; and, further, in April, 1908, just before the commodities clause of the Hepburn Act was to take effect, it is testified that such stock was sold to him to be held as trustee for the stockholders of the Toledo & Ohio Central, in whose names its stock might from time to time be registered on the books of the company, and to whom any dividends should be paid. This arrangement was effected through the redelivery of the old stock certificate to the trustee, from which he at the time erased his original endorsement, and a contract executed by him and the Toledo & Ohio Central bearing date April 30, 1908; and this certificate and contract are still in his possession. After the date of this contract the trustee, on two or three occasions, issued a proxy to the President of the Sunday Creek Company, at his request, to vote the stock at annual meetings; but the trustee has not received any request or any suggestion from the Toledo & Ohio Central, or the officers of any other rail-

road company, with respect to the giving of proxies or the voting of the stock. On April 30, 1908, another contract, similar to the one made between John H. Doyle and the Toledo & Ohio Central, was entered into between the Hocking Valley and the Central Trust Company of New York, respecting the shares of the Hocking Valley in the Sunday Creek Company. After reciting that the Hocking Valley is the owner of 32,375 shares of the Sunday Creek Company (also, among other things, that all these shares with others were pledged through a trustee as collateral security for the bonds issued under the first consolidated mortgage of the Hocking Valley and the Buckeye Coal & Railway Company; and that in view of the penalties imposed for the violation of the Hepburn Act and of a desire to obey the law if constitutional, and at the same time to preserve to the owners of the capital stock of the railway the equity in such coal properties, which could not be disposed of by reason of such pledge), it was agreed that the Railway Company had sold and assigned to the trustee all its interest in such shares of stock, subject to the lien of the mortgage and the rights of the bondholders thereunder, in trust, for the proportionate benefit of the holders of record of the stock of the Hocking Valley and for any distribution of its assets; that the trustee should have the right to vote the shares of stock at all meetings of stockholders of the company, to collect dividends, and (if the Hocking Valley is not in default under its mortgage) to distribute them among the holders of the stock. The only other provisions of the contract so made with John H. Doyle and the Central Trust Company that need be noted are set out in the margin.²

²"In the event, however, that the said Supreme Court shall decide said commodity clause of said Hepburn Act constitutional, then said trustee shall dispose of the equity in said coal stocks sold and assigned to it in trust for the purposes of this Agreement (subject, however, to the lien of the First Consolidated Mortgage, and its rights as pledgee trustee thereunder), when and as directed in writing by the persons, firms or corporations holding and owning of record a majority in amount of the stock of the Railway Company as hereinafter provided, and when such sale or distribution is made by the trustee hereunder, and the entire proceeds, whether of stocks, bonds, moneys, or other securities, shall have been actually paid to and received by the said

Nothing further has been done with the stock of the Sunday Creek Company, and no sale or other disposition of the coal properties has been made in pursuance of these trusts or otherwise. The railroad control of the coal interests remained practically the same, at least until the date of the March agreement, as it was before.

Conclusion Respecting Situation Prior to March Agreement of 1910. We are bound to hold that the situation described was indefensible under the Anti-Trust Act; indeed, no attempt has been made here to justify it. It is quite plain that by the reorganization commenced in 1899 and the course pursued thereafter until the trunk lines obtained their interests in the Hocking Valley, the purpose was to unite and hold the four railroads,³ and their several coal interests under a single controlling power; and we are satisfied from the evidence that this design was consummated at the instance of such companies, and finally rendered more secure through the interests and indirect control of the trunk lines. One of the reasons offered to induce and defend the reorganization was the existence of "undue and bitter competition." After stating that the principal business of the Columbus, Hocking Valley and Toledo (the predecessor of the Hocking Valley) was the transportation of bituminous coal from mines on adjacent property, it was declared that the business was strictly and intensely competitive and that the field in Ohio was covered by seven railroad lines (including in their number the lines of the pres-

trustee, then the said trustee shall distribute, less its proper charges and expenses, all such proceeds in kind received from the disposition of said stocks, among such persons, firms and corporations, their successors and assigns, as shall be stockholders of record of the Railway Company on the first day of the months in which said proceeds and all of them shall have been finally received, pro rata in proportion to their said record holdings of stock of the Railway Company. Any such sale or disposition, however, it is understood shall be made subject to the lien of the First Consolidated Mortgage thereon and to all the terms and conditions of the said mortgage, and only in the event that said Railway Company is not then in default of any requirement of said mortgage."

³ The Columbus, Hocking Valley and Toledo, The Toledo & Ohio Central, The Columbus, Sandusky & Hocking and The Kanawha & Michigan Railway Companies.

ent Hocking Valley, the Toledo & Ohio Central, and the Columbus, Sandusky & Hocking, the predecessor of the Zanesville & Western), and that of these seven lines three operated in one district and the other four lines in a field lying east of that district. The three lines so alluded to could have been no other than the exclusively Ohio lines now in question. It was further declared that in addition to the competition above indicated, the situation was complicated by the fact that of late years the West Virginia coals were rapidly supplanting the Ohio coals in the markets reached by the latter. And, in short, the evidence fairly shows that the union of interest so induced was carefully developed, and that its inevitable tendency and effect were to combine and monopolize the stocks and interests of these railroad companies and coal companies and so to stifle competition in restraint of trade among the states within the settled meaning of the Anti-Trust Act.

The Conditions Created by and Maintained Since the March Agreement. Has the situation described been so changed by or under the agreement of March 12, 1910, as to entitle defendants as they claim to a dismissal of the bill? They forcibly urge that what was done prior to the March agreement has nothing to do with what has been done since. Objections were continuously made to the introduction of evidence tending to show conditions existing before the agreement. Complainant insists that what followed the execution of the March agreement was but a continuation of what preceded it. The fact that we have considered the evidence shows, of course, that we regard it as admissible. It cannot escape notice that some of the defendants were parties to such earlier transactions, and that others subsequently acquiesced in and so were chargeable with them through adoption before the March agreement was made. *Lincoln vs. Claffin*, 74 U. S. 132, 138; *United States vs. Standard Oil Co.*, 152 Fed. 290, 294, per Sanborn, Circuit Judge, and Circuit Judges Van Devanter, Hook and Adams concurring. The acts and transactions of the first period therefore ought to aid in some measure to elucidate the intent and effect of the March agreement, and of the acts and transactions of the parties since, no matter what conclusion may be

reached touching the second period. *Standard Oil Co. vs. U. S.*, 221 U. S. 1, 76; *Darius Cole Transp. Co. vs. White Star Line*, 186 Fed., 66 (C. C. A. 6th Cir.); *U. S. vs. E. I. DuPont De Nemours Co.*, 188 Fed., 128, 134

The March Agreement. The agreement was signed by the Lake Shore and the Chesapeake & Ohio and so far as now material in substance provided, that the Lake Shore would purchase from the Hocking Valley the bond it held of the Middle States Construction Company, which as stated was exchangeable for the entire capital stock of the Toledo & Ohio Central (such stock to carry with it the ownership of 45,100 shares of stock in the Kanawha & Michigan, 5,137 shares of stock in the Sunday Creek Company, and—for the Toledo & Ohio Central—the entire capital stock in and all the bonds of the Zanesville & Western) at an aggregate purchase price of \$10,197,874.67; and would make provision for loaning to the Sunday Creek Company as needed and on its notes \$1,143,110.50. Such purchase to be coupled with an agreement that a contract for twenty-five years would be made and should provide that the line of the Hocking Valley and the line of the Western Division of the Toledo & Ohio Central, between their terminals at Toledo and their connections with the Kanawha & Michigan at Chauncey, might (for cost alone of maintenance and operating expenses according to joint usage) be used at the option of either for the movement of its through freight trains; that an additional agreement should be made to protect the Toledo & Ohio Central and the Hocking Valley under their previous guaranty of bonds of coal companies, and given, as before stated) under an agreement for an equal division of the coal traffic derived from the properties of such coal companies; that an arrangement for distribution of the business, so far as could legally be made, should be effected to protect the interests of the Toledo & Ohio Central and the Hocking Valley respecting their guaranty of such coal bonds. Upon such purchase the Lake Shore was to sell to the Chesapeake & Ohio 22,550 shares of the Kanawha & Michigan for \$1,623,600 and 11,540 shares of the Hocking Valley for \$1,384,800 (which latter stock seems to have been the one-sixth interest that the Lake Shore acquired at the time of the purchase made by the

Trunk Line). Still another contract was to be made "for trusteeing or otherwise jointly handling" the 45,100 shares (a majority of the stock and called the "controlling interest then to be owned by the two companies") in the Kanawha & Michigan. In case the stock was so placed in trust, provision was to be made for such trackage agreements with the Kanawha & Michigan as would protect the purchasing companies against loss of control of the property. Privilege was to be given to make certain connections between the Kanawha & Michigan Railway with the Virginian Railway or with the Lake Shore or Chesapeake & Ohio, the intent being that the lines of the Kanawha & Michigan could be used to the fullest extent by either of the purchasing companies in building up its interest either in local territory on the Kanawha & Michigan or in making through routes and connections beyond it, protecting, however, all the stockholders of that company. Provision was also made for acquiring all or part of the outstanding stock of the Kanawha & Michigan; for having the Kanawha & Michigan purchase the securities of the Pomeroy Belt Railway Company and indemnifying the Hocking Valley against liability assumed by it in the purchase thereof and granting to it a trackage right over such Belt road, etc.; for securing to the Hocking Valley trackage between Athens and Hobson over the Kanawha & Michigan for Hocking Valley through business from or to its line between Gallipolis and Pomeroy. The whole agreement was made subject to a condition that the other roads embraced in the Trunk Line purchase, before pointed out, should sell their holdings in the stock of the Hocking Valley to the Chesapeake & Ohio.

The Chesapeake & Ohio thereupon acquired the holdings of the other Trunk Lines of Hocking Valley stock, which, with the one-sixth it had previously obtained through the Trunk Lines Syndicate purchase and the one-sixth derived under the March agreement, gave to the Chesapeake & Ohio 69,240 shares of such stock. The preferred stock of the Hocking Valley was retired in April 1910, leaving 110,000 shares of common, of which the Chesapeake & Ohio now owns (through increase of its holdings) 88,258 shares; and that company and the Lake Shore now each own 40,271 shares of the stock of

the Kanawha & Michigan (being 80,542 of a total capital of 90,000 shares). The result is that instead of five Trunk Lines as formerly, only two, to-wit, the Lake Shore and the Chesapeake & Ohio, now hold the controlling power, it is true through independent ownership, in the Hocking Valley, the Toledo & Ohio Central, the Kanawha & Michigan, the Zanesville & Western, and also (subject to the trusts and pledge before stated) the Sunday Creek Company. Their interests in the Sunday Creek Company cover its entire outstanding capital stock (included in this are the 12 qualifying shares belonging to the Hocking Valley).⁴

Now it is to be observed of the March Agreement that its avowed purpose was not to avoid violation of any Federal act, but to comply with the decree of the Ohio Circuit Court in the quo warranto case. Such a purpose might it is true be entirely consistent with the Federal Anti-Trust Act; but whether this was so here must be tested by the intent to be inferred both from the agreement and the extent and nature of the control thereby secured over the railroads, and also of the coal traffic and other commerce dependent on them (*United States vs. St. Louis Terminal*, 224 U. S. 394, 395); and such intent and control may, we think, be further ascertained from comparison of important features of the situation existing before the agreement with some of those found in the situation created under it. In applying these tests it should be stated in the outset, that the government has failed in several respects to sustain the averment that there has been since the agreement a continuation of the same conditions as those existing before. Admittedly a change in the ownership of the stocks and bonds of the railroads has been made under the agreement, as before pointed out; and it must be conceded under the evidence adduced that the independent coal operators in the coal fields in question have received greater concern and accommodations at the hands of the railroads since the agreement than they were given before. But we are convinced that the changes so wrought in ownership of stocks have resulted in a concert of action and control of the railroads and coal interests secured by the agree-

⁴ Compare holding shown by stipulation (Rec. 572), with holding stated in Exhibit E, to bill.

ment, which is inconsistent with the rule as to freedom of competition in commerce among the states; and that rule is too firmly established to be shaken by argument against the beneficial results ascribed to it. *United States vs. Union Pacific R. R. Co.*, 226 U. S. 61, 87, 88; *United States vs. St. Louis Terminal*, supra at 401; *Loewe vs. Lawlor*, 203 U. S. 274, 293; *Northern Securities Co. vs. United States*, 193 U. S. 331, 332; *Pearsall vs. Great Northern Railway*, 161 U. S. 646, 676; *United States vs. E. C. Knight Co.*, 156 U. S. 1, 16; *Chesapeake & O. Fuel Co. vs. United States*, 115 Fed. 619, 620 (C. C. A. 6th Cir.); *United States vs. Standard Oil Co.*, 173 Fed. 177, 188 (C. C. A. 8th Cir.).

Evidence was adduced to show that owing to litigation and other causes, some of the provisions of the March agreement have not been carried out; and some of the evidence tends to show that if all its provisions had been carried into effect it would have resulted beneficially to the volume of traffic and those interested in it along the lines of the roads in question. This does not indicate a purpose not to carry out the March agreement ultimately; but it does show that a virtual consolidation of these naturally competing roads (coupled with the division of the coal traffic provided for), so far as concerns the through traffic in coal to the lakes, is necessary to accomplish the result stated; although it does not purport to show how long such increase in volume would last. It is contended by learned counsel, however, that all the provisions of the agreement are valid and enforceable, so long at least as the interested stockholders themselves are satisfied with its performance.

Moreover, evidence was offered to show that the Ohio roads are controlled and operated independently of one another and of either the Lake Shore or the Chesapeake & Ohio, or both; and similarly as respects the Sunday Creek Company, and all these roads either collectively or separately. It is true that the officers of the railroads and the railroad offices are distinct, and this is true of the Sunday Creek Company; also that the managerial officers of the subordinate companies have been instructed to exercise their own judgment respecting the interests they represent; and yet the natural

and probable effect of all this needs but little consecutive thought. Such officials are at last dependent for their positions upon the will of the two Trunk Line companies controlling the stocks; and it is vain to say that such officers do not become sensitive to the interests and policies of the real masters of the situation. Illustrations of this, as also of the effect of the new regime upon interstate commerce and trade, are contained in the evidence relating to both the coal and railroad properties. We have seen that the Sunday Creek Company still holds the same title to the coal properties that it held before the execution of the agreement of March, 1910; and that the Chesapeake & Ohio and the Lake Shore together have been brought into the same relation to the entire capital stock of this coal company that the Hocking Valley alone previously bore to it.⁵ In the March agreement no allusion was made to the trust agreements under which the stock of the Sunday Creek Company was on April 30, 1908, placed in the names of trustees. The shares placed (rather continued) in the name of John H. Doyle, as trustee, were in the March agreement treated as the property of the Toledo & Ohio Central; and the same general policy concerning the coal handled by the Sunday Creek Company that prevailed before the March agreement, has been pursued since. This has resulted in the continuance of an equal division substantially of the coal traffic originating on the Kanawha & Michigan, between the Hocking Valley and the Toledo & Ohio Central. All the coal carried in Kanawha & Michigan equipment is so divided. While the coal that is carried in the equipment furnished by the other two coal companies respectively is divided according to such equipment, yet it would seem from the correspondence and testimony that the desire and effort are to equalize either the cars received or the advantages and consequent profit of transportation, say as between coal and coke, since coke appears to yield more freight revenue to the carrier than coal.

⁵ It should be stated that as early as June, 1905, provision was made by the Sunday Creek Company for purchasing certain trust certificates representing the beneficial interests in the stock of the other two coal companies which are parties to this cause, and this arrangement seems to have been carried out.

Further, some of the evidence (concerning at least the conduct of the Lake Shore) discloses an apparently asserted right to demand, rather than a design simply to persuade, the allowance of such division; and seemingly the officers of the Kanawha & Michigan are disposed to yield it in the same spirit. This augments the similarity in purpose between the division now made of the coal traffic, and the division that was admittedly made prior to the March agreement in obedience to contract.

We do not overlook the testimony to the effect that this additional agreement has not been executed; but it is not perceivable how the companies can in substance do the same thing that the agreement provided for, and escape its effect on the ground either that it has not been reduced to writing and signed, or that such a division is fair. In short, our interpretation of the evidence is that this division of traffic is not due alone to a desire to be fair to connecting companies; but that it is actuated also by a purpose practically to carry out the provision of the March agreement in this behalf, and so protect the Toledo & Ohio Central and the Hocking Valley as joint guarantors "on the bonds of certain coal companies for equal division of the coal from these coal properties." Such a provision or practice is inconsistent with the statutory right accorded to shippers since 1910, say along the Kanawha & Michigan, to secure the benefit of competitive through rates by routing their own traffic by way of either the Hocking Valley or Toledo & Ohio Central according as they might be able through perfectly legitimate means to induce the one or the other company to file and publish lower rates. (See amendment to Sec. 15 of Interstate Commerce Act, passed June 18, 1910, 36 U. S. Stat. L. 552, striking from amended Sec. 15, 34 Stat. L. 590, the limitation: "provided no reasonable or satisfactory through route exists.") That it would be entirely practicable for shippers of coal to secure, with respect to through traffic, a substantial competition with the Hocking Valley and the Toledo & Ohio Central, but for the joint ownership and control of the Kanawha & Michigan seems to us obvious. The president of the Kanawha & Michigan, and

its general freight agent, testified in substance that they had made no effort to secure from the Hocking Valley or the Toledo & Ohio Central in favor of their own company a greater division of the freight rate charged for through traffic; in other words, the motive is lacking to bring about real competition between these parallel roads. Nor does it appear that the officers of either the Hocking Valley or the Toledo & Ohio Central have done anything respecting a greater or less division of the freight rate charged for through traffic. And we do not discover that the officers of the Sunday Creek Company have ever sought to induce any of these railroads to file or publish lower freight rates; and the president of the company (who has filled the office since June, 1910), testified: "We do not do any routing * * * unless it is where coal must be delivered on one road or the other."

Further similarity between the course pursued before the March agreement and since, is to be found in the "operating proposition" as it is characterized in the evidence, which "practically makes each road (the Hocking Valley and the Toledo & Ohio Central) a double track railroad." The arrangement consists of moving the north bound through freight trains of the Toledo & Ohio Central, over the Hocking Valley railroad from Hobson to Fostoria, and of returning the south bound freight trains of the Hocking Valley over the Western division of the Toledo & Ohio Central from Hickox to Columbus; and this is a continuation of the same reciprocal use that was commenced in 1901. Stress is laid both in the evidence and argument upon the economy of this interchange of facilities, since it secures easier grades over the Hocking Valley, as compared with those of the Toledo & Ohio Central, and avoids the necessity of building double tracks and of operating opposing trains over single track roads with the usual sidings. These advantages may be conceded from an operating point of view; yet the logic of it all would in the end destroy competition between parallel roads generally. The reciprocal use in this instance developed only with the non-competitive period of these railroads. It is not meant by this that there may not be circumstances under which reciprocal trackage

arrangements may to a certain extent be lawfully entered into and carried out. Nor is it meant that this trackage arrangement, standing alone disassociated from the joint ownership and control of the Kanawha & Michigan would violate the federal anti-trust act. What is meant is that this trackage arrangement, considered in connection with the other facts pointed out, tends to disclose a unity of purpose and concert of action on the part of the companies involved to maintain conditions that are inimical to effective competition. Testimony was offered to show that giving to the Chesapeake & Ohio and the Lake Shore equal interests in the Kanawha & Michigan and adding the advantages of this reciprocal use of tracks, operate to stimulate rather than to retard the transportation of coal, and in fact have resulted in substantial increase in volume of traffic; and, further, that if these arrangements were broken up the traffic in West Virginia coal would be monopolized by the Kanawha & Michigan and the Toledo & Ohio Central. This loses sight of the natural development of the coal fields tributary to the Kanawha & Michigan, which should occur under normal conditions. It also evades the obvious question: whether, if the Kanawha & Michigan were owned and operated independently of both the Hocking Valley and Toledo & Ohio Central, and those roads were brought into competition for the traffic originating on the Kanawha & Michigan, there would not be a still greater stimulus given to interstate trade than has heretofore existed? There would, in that event, be neither reason nor opportunity for a monopoly of such traffic by the Kanawha & Michigan and Toledo & Ohio Central. The conceded easier grades of the Hocking Valley furnish adequate answer to the suggestion of such a monopoly. *Pearsall vs. Great Northern Railway*, 161 U. S., at 676; *United States vs. Union Pacific R. R. Co.*, supra.

Insistence is made that a number of the things complained of were in and of themselves lawful and so, in effect we take it, their union or joint use could not become unlawful. For instance, it is urged that it would have been well within the power of the Lake Shore to purchase the entire stock of the Toledo & Ohio Central and the Kanawha & Michigan, because the Kanawha &

Michigan is a continuation of the Toledo & Ohio Central. Likewise it is insisted in respect to the Chesapeake & Ohio that it possessed charter power to purchase the stock of the Hocking Valley, and that it was both its purpose and right to secure control of a railroad leading directly to the lake ports. Let these claims be conceded for the sake of discussion; still, does it follow that the Lake Shore and the Chesapeake & Ohio could lawfully become joint and equal owners in the controlling portion of the stock in the Kanawha & Michigan? Could they at the same time add to this mutual control of that road the reciprocal trackage arrangement respecting the other roads, and so virtually consolidate these railroads so far as respects the through traffic in coal? These questions are stated not merely with reference to the apparent violation involved of the statutory policy of Ohio respecting parallel and competing railroads (State vs. Hocking Valley, 12 O. C. C., N. S., 66, 67, before cited); but particularly with respect to the effect that such joint ownership and trackage arrangement must have upon interstate commerce. The policy of the United States and of Ohio, as expressed by legislation and judicial interpretation, is quite as distinctly opposed to any union of ownership and arrangement involving the power to control parallel railroads or the transportation of traffic that is tributary to and must pass over one or both of them, as it is to formal consolidation of such railroads. (Northern Securities case, *supra*, at 362; United States vs. St. Louis Terminal, *supra*, at 395; United States vs. Union Pacific R. R. Co., *supra*; State vs. Hocking Valley, *supra*.) We have seen that the Ohio Circuit Court ousted the Hocking Valley from the power of owning and holding shares of stock in the Kanawha & Michigan. The Hocking Valley, it is true, does not now own stock in the Kanawha & Michigan; but the Chesapeake & Ohio does, and it also owns the controlling interest in the Hocking Valley. The Chesapeake & Ohio thus holds stock in two roads, which are in substantial degree parallel and naturally competing. Can this result, or the results before pointed out as brought about since the March agreement was executed, be rightfully traceable to the charter powers of these two railroad com-

panies, the one to reach the lake ports and the other the coal fields?

It can not be that those companies can justify their separate stock purchases of the control of these roads and also escape responsibility for the inevitable tendency of the present conditions to stifle free competition, simply on the theory that the companies holding the legal titles to the roads are alone responsible for this result; for that would be to overlook not only the manifest unity of purpose of the Lake Shore and the Chesapeake & Ohio, but also and especially in their acquiescence, not to say concurrence, in the acts of the subordinate companies. This can not be avoided on the ground that corporate ownership of stock in railroad corporations created by a state is not interstate commerce (considered in the Northern Securities case); nor, in the present instance, by the fact that capital stock in two of the competing roads is held separately by two corporations instead of one corporation; for the other matters involved here, or anything like them, were not present in the Northern Securities case. To ignore such matters would be to furnish an easy method to frustrate the statutory inhibitions in question. Indeed, if these two purchasing companies are not in effect equivalent to a committee to regulate rates, certainly the subordinate railroad companies under their control are, within the meaning of the concurring opinion of the late Justice Brewer, in the Northern Securities case. When speaking of the single holding company in question there, the learned justice said (193 U. S. 362):

"In this case it was a mere instrumentality by which separate railroad properties were combined under one control. That combination is as direct a restraint of trade by destroying competition as the appointment of a committee to regulate rates."

If the intent to place the ownership of the stocks in question in the Lake Shore and the Chesapeake & Ohio can be rightly inferred from what has actually been done since, "the purpose to combine and by combination destroy competition" (Northern Securities case, p. 362), existed when the March agreement was executed, quite as certainly as such purpose was held to exist in that case "before the organization of the corporation, the

Securities Company." The form given to a combination is of no consequence; as the learned Chief Justice said in the Tobacco case (221 U. S. 181):

" * * * it was pointed out (in the Standard Oil case) that the generic designation of the first and second sections of the law, when taken together, embraced every conceivable act which could possibly come within the spirit or purpose of the prohibition of the law, without regard to the garb in which such acts were clothed."

It hardly need be said that the decisions relied on by the defense, like *Bigelow vs. Calumet & Hecla Mining Co.* 167 Fed. 721, 728, decided by the present Mr. Justice Lurton in this court, and by Judge Knappen in the court below, have no application.

There is to be added the apparent purpose of the Lake Shore and the Chesapeake & Ohio to retain their relations with the Sunday Creek Company. The feature of the trust agreements of present importance is quoted in the margin of an earlier portion of this opinion. It provides that in case the Supreme Court should hold the commodities clause constitutional, each trustee was to dispose of the equity in the railroad companies in the Sunday Creek stock, as directed by the holders of a majority of the capital stock of the Hocking Valley and the Toledo & Ohio Central respectively, and distribute the entire net sale proceeds among such holders. It need not be stated that the commodities clause, as construed by the Supreme Court, has been held to be constitutional (*United States vs. Delaware & Hudson Co.*, 213 U. S. 316; *United States vs. Lehigh Valley R. R. Co.*, 220 U. S. 257). The first of these cases was decided May 3, 1909, about ten months prior to the date of the March agreement, and considerably more than a year before the commencement of this suit. It is said that such sales can not be enforced in this case, because of infirmities in the pleadings. If in the view we take of the evidence this objection can be regarded as material (*Lockhart vs. Leeds*, 195 U. S. 424, 436), we perceive no sufficient reason why at this stage of the case, the objection can not be met by amendment (*Neale vs. Neals*, 76 U. S. 8, 9; *The Tremolo Patent*, 9 U. S. 527). As respects the power of the court to require such sales and distributions to be made, we think it is

clearly given by Section 4 of the Anti-Trust Act (26 U. S. Stat. 209; Standard Oil case, p. 78; Union Pacific case, *supra*); and if the trustees or the absent stockholders in the Hocking Valley are indispensable parties defendant, they may be brought in (*Hoe vs. Wilson*, 76 U. S. 501, 504; *Rodgers vs. Penobscot Mining Co.*, 154 Fed. 606, 616). It is to be observed that there is no Ohio legislation authorizing railroad companies to hold shares of stock in coal companies. The Ohio Circuit Court held in the quo warranto suit before cited that the Hocking Valley was not a "kindred" corporation within the meaning of the statute empowering private corporations to hold shares of stock "in other kindred but not competing private corporations," etc. (Sec. 8683, 4 Ohio Gen. Code, 239; 12 O. C. C. 59-63). If these companies are to be allowed potential control both of producing and transporting coals in 100,000 acres of coal lands, it is difficult to see why in spite of the commodities clause common carriers may not combine the benefits of transportation with the benefits arising from the control of any of the other necessities of life, no matter in what quantities. Attorney General vs. Great Northern Ry. Co., 29 Law Journal (N. S. Equity), 798, 799; approved in *New Haven R. R. vs. Interstate Com. Com.*, 200 U. S. 393.

The only remaining matter needing consideration is the testimony offered in open court tending to show that the grades of the southern division of the Hocking Valley are so difficult as to prevent successful movement over it of through coal trains; and further that by reason of the configuration of the territory adjacent to the Kanawha River, there is no room for the construction of a track additional to that of the Kanawha & Michigan on the one side or to the tracks of the Chesapeake & Ohio on the other.

Decisions are cited to show that these physical conditions warrant alike disuse of the southern division for through coal service, and the joint control acquired of the stock in the Kanawha & Michigan. Among these is *United States vs. Union Pacific R. Co.*, 188 Fed. 102, reversed in part December 2, 1912, (226 U. S. 61, before cited.) We think the undisturbed portion of the decision below is distinguishable, and what is said in this behalf will serve to indicate our views concerning the other cases

cited in connection with it. The material points of distinction appear in certain facts: (a) The San Pedro line from Salt Lake to Los Angeles was found to be practically a continuation of the Union Pacific or (its subsidiary company) the Oregon Short Line, and not a natural competitor of any other line in question; (b) the physical obstacles encountered on the San Pedro line find no analogy here, unless it be south of the Ohio River and adjacent to the Kanawha & Michigan or a portion of the Chesapeake & Ohio, but it is not shown that connection between the Chesapeake & Ohio and the Hocking Valley is not otherwise reasonably available; (c) there was nothing in the Union Pacific case to correspond in any way with the combined coal interests here and the relations between them and the present railroad companies. In that case, the failure to build two projected parallel lines of railway between Salt Lake City and Los Angeles was held not to be violative of the Anti-Trust Act; while here, with out repeating what has been said before respecting the present railroads and coal properties, the resultant fact can not be ignored that between Toledo and Kanauga, two actually existing parallel lines of railroad have practically been converted into one line so far as respects the through traffic in coal. The disuse of the southern division of the Hocking Valley is claimed to be justified in the face of several admitted facts. It was constructed as a substantial portion of the Hocking Valley system, and there is no showing that it was not projected by experienced railroad men. At the time the reorganization was commenced in 1899, the railroad agencies concerned found that there had been undue and bitter competition in the coal traffic dependent upon the railroads operating in the Hocking field. The suppression of competition worked out through that reorganization was obviously calculated to engender neglect of either the Kanawha & Michigan north of the Ohio River, or the southern division of the Hocking Valley, as respects the movement of heavier trains. The railroad defendants here were participants in the policy that succeeded that plan of reorganization. And yet it is in effect insisted that the original plan and construction of the road, as well as its continued maintenance, should be condemned as part of a through line and its practical aban-

donment for that purpose sanctioned by judicial decree. There is a clear distinction between the power to grant relief respecting past failure to construct one of two projected parallel liens, as occurred in the Union Pacific case along the course of the San Pedro division, and the power to prevent the elimination of one of two parallel roads in actual existence and operation. After all the difficulty north of the Ohio River is due alone to differences in grades, and it may be judicially noticed that grades may be changed (*Delavan vs. New York, N. H. & H. R. Co.*, 137 N. Y. Supp't. 207, 212). It would hardly be contended, even apart from express statutory inhibition, that such differences would warrant formal consolidation. It may be said of this situation as Mr. Justice Lurton said December 16, 1912, of a situation involved in the cases of the Reading Company concerning prices of coal at the seaboard, that "The situation is therefore one which invites concerted action and makes exceedingly easy the accomplishment of any purpose to dominate the supply and control the prices" of coal at the lake ports and beyond. The paramount evil here is the joint ownership of the Kanawha & Michigan and so long as that continues, effective competition will we think remain impossible. Effective competition is not limited alone to a matter of freight rates; it embraces a variety of other subjects, such as quality and promptness and sufficiency of service both as to equipment and roadbed, which are dependent above all upon separate and independent ownership or control alike of the competing roads and of the commerce under compulsion to use them. Surely the necessity to maintain such conditions as these is not affected by anything contained in the act to regulate commerce; for plainly that act was not intended to supplant either the settled rule respecting freedom of competition or the purpose of the Anti-Trust Act to deal with corporate ownerships or agreements that constitute barriers to such competition.

In the Northern Securities case, after declaring the comprehensive character of the statute, Justice Harlan expressed the prevailing general rule, as we understand it, thus (332):

"That to vitiate a combination, such as the Act of Congress condemns, it need not be shown that the

combination, in fact, results or will result in a total suppression of trade or in a complete monopoly, but it is only essential to show that by its necessary operation it tends to restrain interstate or international trade or commerce or tends to create a monopoly in such trade or commerce and to deprive the public of the advantages that flow from free competition."

Are the averments of the bill charging continuance in different form of the combination begun in 1899, so far supported by the proofs offered in that behalf as to justify the granting of relief touching the situation created by and under the March agreement? Comparison of that agreement and what has been done under it, with the first situation, can not we think fail to show material identity between the two periods in dispute. True, combination by the March agreement or by anything done since then is denied by the answers, and testimony was introduced in support of the denial. We need not recapitulate either the terms of the agreement or the facts and conditions already stated. We cannot believe that the changes in ownership of stocks, in managerial officers and the like, have operated to relieve the railroads and coal interests in question from the influence in practical effect and consequence of a unified control. It cannot be that in the absence of intent or design substantially the same things of controlling importance could have been worked out during the later period, that were before. It is not necessary that the proofs should show that precisely similar methods were adopted to bring about the continuance averred, or that all the parties theretofore engaged, like the withdrawing trunk lines, continued as actors. The results attained and continued through a unity of purpose and concert of action, by those remaining in the combination at and after the date of the March agreement, are the true tests of the trend of the evidence as an entirety.

Upon the whole we conclude that the March agreement, and what has been and is being done under it, operate unreasonably to restrain and monopolize commerce among the states, and, consequently, that complainant is entitled to relief; but the precise extent and nature of relief to be awarded can not at this stage be determined.

The case has been tried on the issue of continuance or not of the antecedent combination and restraint; and this has resulted in leaving the court unadvised of the claims of counsel for either side as to the nature and extent of relief, if any, that should be granted. However, we now hold (1) that the equity of the Lake Shore and of the Chesapeake & Ohio in the capital stock of the Sunday Creek Company shall be disposed of by absolute sale, and to this end the trustees in whose names such stock is held shall be made parties defendant to this suit (Bates Fed. Eq. Proc., Sec. 639; Perrin, Admr., vs. Lepper, 26 Fed. 545, 548; St. Louis, etc., Ry. Co. vs. Wilson, 114 U. S. 60, 62; Woodward vs. McConnaughey, 106 Fed. 758—C. C. A. 9th Cir.); (2) that the joint ownership and control of the Kanawha & Michigan must be terminated. The questions not decided and upon which leave will be given for further argument are: (a) whether the holders of capital stock in the Hocking Valley, other than the Chesapeake & Ohio, are indispensable parties to the cause; (b) in what manner the termination of the joint ownership and control of the Kanawha & Michigan shall be affected; (c) whether in connection with the means adopted for the termination of such joint ownership and control of the Kanawha & Michigan, the reciprocal trackage arrangement over the Hocking Valley and the Toledo & Ohio Central must be terminated; and (d) to what further extent and in what further respects, if any, relief shall be granted touching the control and operation of the other railroads mentioned.

Such further argument will be had at a date hereafter to be fixed between January 21st and 31st next.

Knappen, Circuit Judge, concurs.

Denison, Circuit Judge, (concurring in part, dissenting in part):

I quite agree that the present ownership of the Sunday Creek stock by or for the railroads is unlawful, and that the coal companies and the railroads should be separated. This conclusion must be tentative, until the other necessary parties can be heard, but it seems probable that all the facts have been developed. I would base this result on the commodities clause of the Hepburn Act and the "mere instrumentality" theory of the Lehigh case (220 U. S. 257) rather than upon the Sherman

Act; but the use of either basis brings the same result. Beyond the matter of the coal companies, and in the mere present relation of the railroads to each other, I am unable to see any monopoly or restraint of commerce forbidden by the anti-trust law. Some of the considerations compelling me to this opinion are these:

1. It is true that the history of their former relations during the 1900-1910 period must be studied for whatever bearing it may have on their present intent; but this study discloses to me, not continuance but change, not identity but antithesis. The Hocking and the Central¹ were parallel roads with common termini and with other common points. They had competed bitterly for the Hocking Coal District traffic to Columbus and to Toledo, as well as for all other traffic originating on their lines and destined to common points. In 1900, the Hocking bought the Central, and from then until March, 1910, this naturally and theretofore actually competing line was owned by the Hocking. The Hocking dictated the policy of both; both had the same directors and managing officers. The merger was complete; competition was not restrained, it was eliminated. No more perfect union and joinder in operation, while saving the former corporate identity of each, could be stated. After March, 1910, these two roads continued physically the same; but neither the Hocking nor its dominating stockholder had any ownership of the Central or had any interest, direct or indirect, in such ownership; nor did the Central or its dominating stockholder have any ownership of or direct or indirect interest in the Hocking. No director or officer of one road was director or officer in the other, or had any share in its management or operation. No more complete severance of the two roads could be formulated. There remained no connecting link (except the common control of the Kanawha, hereafter discussed).

2. Since March, 1910, there has been full and complete competition between these two roads (save only for the Kanawha traffic). As to all the Hocking Coal District

¹ I will refer to the Hocking Valley Railway Co. as "the Hocking;" to the Toledo & Ohio Central and the Zanesville & Western Railroads as "the Central;" to the Kanawha & Michigan Railway Co. as "the Kanawha;" to the Lake Shore & Michigan Southern Railway Co. as "the Lake Shore;" and to the Chesapeake & Ohio Railway Co. as "the Chesapeake & Ohio" or "the C. & O."

traffic bound for Columbus or Toledo, and as to all other business originating on these roads, competition is unimpaired. So reads all the evidence; there is no proof to the contrary. The competitive conditions prevailing before the unlawful merger of 1900 have been restored—excepting only that the rate-cutting war then in progress has not been resumed. Both roads maintain their rates against sudden or secret cuts, as they are bound to do by both state and federal law. To base the assumption that they are combining in restraint of trade solely upon their maintenance of the same rates between common points, would, by the same token, convict every railroad in the United States which is obeying the law; yet such assumption is, to my mind, the only basis for believing that such combination has existed since March, 1910 (still excluding from our thought and reasoning the Kanawha traffic.

3. The conclusion just stated—that there is no other basis for inferring a suppression of competition—is not affected by observing the joint trackage contract. It is true this contract was made during the period of undue intimacy, and probably it would not have been made between roads actively competing as strangers to each other; but this does not determine its character or effect. In March, 1910, the purchasers of these two roads (the Chesapeake & Ohio and the Lake Shore) found this joint trackage contract in existence; they saw that the entire physical and traffic situations on both roads were accommodated to this contract. They saw that it served, in large measure, as a substitute for double tracking each road; that it enabled each road to haul more traffic and give better service and at a less cost, and so, presumably, at a less rate than either could otherwise have done, except by expending vast amounts in double tracking; that it was an operating arrangement having no connection whatever with competitive traffic seeking; that of itself it was of great and undisputed benefit to both railroads and to the shipping public, and of itself did not and could not work any harm to any interest, public or private. Under these circumstances, the purchasers preserved and continued this public and private benefit, and I cannot see how such conduct has any bearing, even evidential,

to convict them of suppressing competition in traffic getting.

4. The conclusion that restraint of competition since March, 1910, in traffic originating on these lines, has not been restrained is confirmed by the fact that there is no complaint by shippers of such traffic. Serious or long continued restraint of proper competition is a disease producing inevitable and well-known symptoms—discrimination, excessive rates, poor service, unfair practices and the like. The relations now said to be unlawful had been in existence for a year when this bill was filed, and for another year before the testimony was closed; and we did not have pointed out to us in the argument, nor have I seen in the record, any instance of any complaint by any shipper or consignee on any of these subjects.²

5. If I am so far correct, there remains for consideration among the primary inquiries, only the matter of joint control of the Kanawha by the other two roads; and the conclusion which we reach as to whether or not this joint ownership and control, as developed in this case, are violative of the law, must, I think, determine the whole case. I agree that the fact of the ownership of this stock by the Chesapeake & Ohio and the Lake Shore, instead of by the Hocking and the Central, is not, of itself, controlling. The presence of the former roads, instead of the latter in the field of the problem, can affect only the question of the dominant intent in the whole transaction; the name in which they entered their Kanawha stock purchases means nothing. I agree also that the entire arrangement of March, 1910, was accompanied by, and in some degree depended upon, a clear understanding (and therefore, an agreement) that the Kanawha should, as far as it could, divide its through north-bound traffic equally between the Hocking and the Central. This does

²I do not overlook the broad complaint that the rates from the Hocking District were too large in proportion to the rates from the Kanawha District; but in fact, the rates were fixed with relation to the Pittsburgh-Ashtabula rate. This rate was not made by these defendants, but it was the "keystone of the arch." When the Commission reduced this Pittsburgh rate from 88 to 78 cents, the Hocking voluntarily reduced its Hocking-Toledo rate from 85 to 75 cents, and the 75-cent rate has been sustained by the Commission. (See I. C. C. Reports, opinion No. 1941, case No. 4274, New Pittsburgh Coal Co. vs. Hocking Valley Ry. Co., Vol. 24, p. 244.)

not become less true because they never executed the contemplated written agreement, nor because their perfected understanding referred to a division that should be "fair" rather than to one that should be "equal". Under the anticipated conduct of all parties—equal furnishing of cars, etc.—no division which was not equal would be fair, and the two mean the same thing.

6. We are brought, then, to the general question when and how far the purchase, by two parallel and competing roads, of a common connecting and continuing road, under an agreement to divide the through traffic derived therefrom, violates the law, and then to the specific question of application to the facts of this case.

Purchase by one line of a connecting and continuing line has never been thought unlawful, although if the purchasing is one of two or more competing for the through traffic from the connecting line, such purchase, inevitably, strongly tends to destroy existing competition.³ Such a joint purchase by two competing lines has never been held, *ipso facto*, unlawful. Indeed, the Supreme Court has said (by what is probably a dictum, *Southern Pac. Co. vs. Interstate Com. Com.*, 200 U. S., at p. 559) that such competition is not the competition which an analogous statute was intended to preserve. In March, 1910, the first carrier had the right to select the continuing carrier; after June, 1910, this right belonged to the shipper, if he chose to exercise it; and it calls for a construction of the statute which has not yet been given to say that agreements between carriers as to how they will divide and carry this kind of traffic (a very different thing from a pooling contract) or the carrying on of such

³ At one time, the New York Central, the Erie and the Lehigh competed at Buffalo for the east-bound through traffic from the Lake Shore, and the Michigan Central, Grand Trunk and Lake Shore competed for the west-bound through traffic from the New York Central. The purchase of the Lake Shore by the New York Central restricted, if it did not end, this competition, for not until June, 1910, could joint rates have been compelled, nor, if there had been through joint rates, did the shipper, until that time, have the right of selection. (See *Stat. at Large*, Vol. 36, 552, 553. Formerly, a through joint route could be compelled only as there was no existing "practicable" through route.)

division when this bill was filed is a monopolizing or restraint of trade or commerce contemplated by the act.^{3a} At the same time, it is clear that competition between carriers for traffic from one connecting line may affect the condition of the shipper upon the originating line, and I see no reason to doubt the proposition which, in this respect must underlie the opinion of the court, viz., that the forbidden restraint may be found in this joint purchase of a common extension by two competing roads; but it seems clear that in a case of this class the criterion must be found in the principle stated by Mr. Justice Lurton in the St. Louis Terminal Case (224 U. S. 394):

“Whether it (the transaction in question) is a facility in aid of interstate commerce or an unreasonable restraint forbidden by the Act of Congress * * * will depend upon the intent to be inferred from the extent of the control thereby secured over the instrumentalities which such commerce is under compulsion to use, the method by which such control has been brought about and the manner in which that control has been exerted.”

From this statement and from the very recent, familiar decisions of the Supreme Court, including the Union Pacific merger case and the Reading case, it seems accurate to say that whether the situation created in March, 1910, operated in aid of interstate commerce or in the forbidden, unreasonable restraint thereof will depend upon (1) the extent of commerce restraining power inherent in the joint ownership of the Kanawha; (2) the characterizing intent and purpose of this joint ownership to be inferred not only from the power secured, but from all the proofs; in other words, whether such restraint of competition as was inherent in the joint ownership would amount to a primary, and, therefore, direct restraint of trade, or would rather be incidental to ends primarily lawful;

^{3a} Without doubt, two parallel roads might join in building, from a common terminus, and owning a new road connecting with and continuing both. Joining in buying an existing extension seems to stand, logically, on the same ground—unless, as matter of fact, the purchase was with the dominant purpose of stopping existing or normal competition.

and, (3) the amount of restraint, actual or potential, which did take place.

7. If this joint ownership has the prohibited effect, it must be found (a) in competition as to divisions; (b) in competition as to rates, or (c) in competition as to service.

(a) Clearly the joint ownership tends to prevent the Central and the Hocking from bidding up against each other in the divisions that they will offer to the Kanawha for this traffic, and so the other Kanawha stockholders might make less money. This is not the kind of competition which the statute desires to preserve. It serves no public interest. It tends, because of a disproportionate division to the initiating carrier, to poor service by the continuing carrier and to indifference by both to the interests of the shipper. It has long been recognized as a traffic evil. On its elimination we can not predicate guilt.

(b) It is clear, too, that an agreement to divide traffic would, as a general proposition, have some tendency to prevent competition in rates; that is, the Hocking would not be so likely to name its lowest rate from Ohio to the lake as if it was not sure of half the traffic any way, and so the through rate from the Kanawha District to the Lake might not fall to the point where it would be brought by full competition.* This is, I think, as strongly as this feature can be stated. It is, of course, now perfectly well settled that free competition is the policy of the law, and it is none of our concern whether this is, as to railroads, the best economic policy; but when we are trying to decide whether we are compelled to find a dominating intent to restrict trade merely because one inducement to compete in rates is removed, we can not shut our eyes to the small part which rate competition now plays. These contracting parties knew, in 1910, as we all now know perfectly well, that under the thorough and efficient administration of the Interstate Commerce law, rate cutting, as a means of getting business, either from shippers, or from connecting lines, has ceased;

* The actual effect of the (theoretical) rate sustaining interrelationship is minimized by the fact that coal rates go by districts, and a change in one district would affect all the others. (See note 2.)

all rates, through as well as local, must be published and can not be cut until after thirty days' notice; a published cut is reasonably sure to be met by all who are competing without a differential; no contract for traffic in consideration of a cut can be made; and, as cutting rates will not get business away from a competitor, rates are not voluntarily cut. I do not mean to say that this disappearance of rate cutting makes lawful a contract to maintain rates; not at all; but it does affect and minimize the evidential importance of a contract removing one inducement to cut rates, when we are determining the character of the entire transaction of which that removal is only one element.⁵

(c) Coming to competition in service—it is not to be denied that such a traffic-dividing agreement as here exists tends to discourage his kind of competition, and that there is here, in theory, some degree of restraint—more likely to have actual effect than is the restraint as to rates.⁶

We find, then, both as to rates and service, some impediment to ideally free competition; but that ideal is rare, if it exists at all; we must have a practical standard of comparison; that standard must be the lawful situation which would exist, except for the agreement said to be forbidden. This lawful situation is usually that which was displaced by the agreement under attack; but in this case the next earlier situation was itself unlawful, and to get on solid ground, we must go back to 1899. The theoretically perfect remedy would be to restore the condition existing in 1899. The bill of complaint and the logic of the situation lead

⁵ In the same way, when some tendency to maintain high rates is only an incident of the contract under attack, we may well remember that the shippers' meritorious grievance on this point is the maintenance of an unreasonable rate, and for that he has an effective remedy.

⁶ While each road is content with half the Kanawha traffic, and the Kanawha has the power to equalize, the agreement to divide tends to make both Ohio roads careless as to good service. Now that the shipper has the absolute right of through routing, the Kanawha's power to equalize rests solely on its relations to the Sunday Creek mines, which originate a considerable part of the tonnage, available as an equalizing medium—so that here, too, the Sunday Creek ownership is the real evil. With this removed, the agreement to divide the Kanawha traffic becomes comparatively ineffective, and the shippers' right of through routing must bring the freight solicitors to them in competition.

there and lead us nowhere else. When we get there, we find that the Central practically owned the Kanawha. For ten years it had been the majority stockholder, and it was in absolute control. For the Kanawha traffic, the Kanawha and the Central formed one through unitary line from the mines to the lake. The Hocking could not compete for part of the haul, and so far as concerns any benefit to the Kanawha shippers, the Hocking might as well have been out of existence.⁷ As compared with this situation, I can not doubt that the present arrangement is an aid, not a restraint, to competition.

This was in 1899. If we ought to look for a standard of comparison in 1910, that standard must be, such other lawful arrangement as might naturally have resulted in the course of separating the two Ohio roads, if the contract for joint control of the Kanawha had not been made. This other arrangement would almost certainly have been the purchase of the Kanawha by or for either the Hocking or the Central exclusively in its own interest. The Kanawha had always been operated in connection with one or the other or both of these roads. It had little reason for existence, except as an extension of one or both of these roads; except in co-operation with them, it could not get its coal to market. It is not impossible that a wholly independent purchaser for the Kanawha might have been found, but that there should be an independent purchaser who did not plan to resell to one of the other through lines, and who would pay anything like the price which the road was worth to either one of the Ohio lines as an extension, is highly improbable. Suppose, then, that it had been purchased in 1910, by or for the Central (and the government concedes that would have been lawful), it follows that all the Kanawha traffic would have gone through Ohio over the Central so far as the Kanawha and the Central, acting directly or indirectly, could have brought about this result. So long as a satisfactory through route was provided by the Kanawha-Central Line, the Kanawha could not have been

⁷ There was then (in 1899) no way of compelling the Kanawha to join the Hocking in a through route or joint rate—nor was there, indeed, in 1910. (See note 8.)

compelled to establish a through route or rate by way of the Hocking, and the Hocking could not have competed at all.* Even if the Kanawha could have been compelled to establish a through route and rate via the Hocking the same as via the Central, the Kanawha-Central could have made the part of the rate south of the Ohio river so high, and the part north of the river so low, that the Hocking could not make a competing local rate; or even if this trouble was overcome, there would still remain the numerous practical obstacles which the Kanawha-Central management could oppose to a diversion of part of its through traffic. In any of these events, the Kanawha shippers would have no remedy from the law or from the Interstate Commerce Commission, excepting to compel a reasonable through rate; and that remedy has never been impaired.

These considerations lead me directly to the conclusion that the Kanawha-Hocking-Central relationship now attacked, produced (inherently) for the Kanawha District shippers less monopoly and more competition and better service than would have followed from either of the alternative arrangements which would naturally have resulted in 1910, if this one had not been

* In March, 1910, the Commission could direct two roads to join in a through rate and route only, "provided no reasonable or satisfactory through route exists" (34 S. L., 590). It seems clear that the Kanawha-Central route would have been made and kept a "reasonable and satisfactory through route" so that the power to compel the Kanawha to join with the Hocking never would have arisen. In June, 1910, this proviso was cut out, but its place was taken by the provision (36 S. L., 552):

"And in establishing such through route, the commission shall not require any such company, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith which lies between the termini of such proposed through route, unless to do so would make such through route unreasonably long as compared with another practicable through route which could otherwise be established."

This is awkwardly expressed, because of the lack of definite antecedent for "to do so;" but it seems to mean that, if the condition in 1899 was restored, and if the Hocking demanded from the Kanawha a joint through route, via either Athens or the River Division, the Kanawha could not be required to comply, because such route would embrace substantially less than the entire length of the Kanawha to Corning, and less than the entire route between its termini, the Kanawha District and Toledo, over railroads "operated in conjunction and under a common management and control." So the Hocking solicitors, in the Kanawha District, would have been helpless.

made. The other would have been, concededly, lawful. I can not find unlawful monopoly, resulting from inherent power to restrain competition, where that power is less than it would be in the lawful alternative situations.

8. If the intent unlawfully to monopolize or restrain may not be inferred merely from the existence of the power, where that power is of the limited extent and of the peculiar nature which have been described, is that intent otherwise proved by this record?

The five trunk lines had been engaged in an unlawful combination and had been directed by the Ohio Supreme Court to dissolve such combination. It is their purported dissolution which is now under review. Where the only question is whether the defendants are in bad faith continuing a violation of the law after having pretended to quit, it seems to me reasoning in a circle to draw, from their former misconduct, any serious inference of their present bad faith.

If the Chesapeake & Ohio and the Lake Shore had purchased the Kanawha stock with no interest in the subject-matter, except to control its traffic for the Hocking and the Central, the question would be different; but that was not the sole interest of either purchaser. The Chesapeake & Ohio desired an outlet to Lake Erie for all of its own great traffic.^{8a} For this purpose, it desired to buy the Hocking. This purpose and this desire were beyond criticism; but to reach Gallipolis, the nearest point on the Hocking, it must build across the Ohio river and over thirty miles of difficult country, and it must then, for its traffic, either practically rebuild the Hocking River Division, seventy-five miles, to Logan, or build, new, fifty miles, to Athens, in order, one way or the other, to reach the modernized lines of

^{8a} That this was real, not pretended, is shown by what happened. In 1909, the first full year before the change, the C. & O. delivered to the Kanawha for hauling over its line, 4000 tons of coal and coke and 70,000 tons of other freight. In 1911, the first full year after the change, it so delivered 811,000 tons of coal and coke, and 168,000 tons of other freight. Between the same periods, southeasterly bound freight received by the C. & O. from the Kanawha increased from 122,000 tons to 199,000 tons. This enormous tonnage given by the C. & O. to the Kanawha was not merely diverted from the other connections of the C. & O., because there was no decrease in the tonnage given to these other connections.

the Hocking. Why should it be required to do this, paralleling the Kanawha, when it could buy such an interest in the Kanawha as secured to it the indefeasible right to use the Kanawha as this connecting link? What rule of public policy required it to build this new road instead of buying the existing road?

Turning to the Lake Shore, we find that it desired to buy the Central for the purpose of reaching the coal fields and getting both coal traffic and fuel coal for itself and its allied New York Central lines, and to make connections for through traffic both ways, with the Coal & Coke and the Western Maryland roads. These were rightful and legitimate objects, also beyond criticism. So was its desire to have this feeder reach the Kanawha District. Apparently, no one questions that it could rightfully have purchased the Kanawha outright, nor is there, to my mind, any reason for ascribing to the Lake Shore any moving purpose in the whole transaction of March, except that just mentioned.

We find, then, that the Chesapeake & Ohio had the legal right to buy the Kanawha and a strong and lawful motive for so doing, and that the Lake Shore had the same right and an equally strong and lawful motive, and that this underlying and justifying motive by each had nothing to do with the thought of suppressing competition between the Hocking and the Central; yet the Lake Shore knew that if the Chesapeake & Ohio made the purchase, the Lake Shore would be defeated in its plan of reaching the Kanawha fields, and the Lake Shore's subsidiary, the Central, would get no Kanawha traffic which the Kanawha could divert; and the Chesapeake & Ohio knew that if the Lake Shore made the purchase not only would the former's subsidiary, the Hocking, get little through traffic, but the whole scheme for the Chesapeake & Ohio outlet to the lake would be defeated. Under these circumstances, what more natural than that they should join in buying the Kanawha, each secure against exclusion by the other, and what primary or characterizing unlawful purpose can be found in such a joint purchase? If this joint purchase was, for these reasons, rightful and lawful, as I believe it was, the arrangement for dividing between the Central and the Hocking the traffic origin-

ating on the Kanawha, though important in itself, becomes relatively a mere incident of the main transaction, and its real purpose was to prevent a monopoly of this traffic by either purchaser. It makes little difference how express the equal division agreement was. Such an agreement would be implied from such a situation. Nothing else would be fair or right. If a receiver should be appointed for the Kanawha, the court would direct him to do just what this division agreement called for and what these parties have been doing, viz., divide this traffic equally between the two Ohio lines, so far as he could do so and so far as they were equal in their furnishing of cars and other facilities; in other words, "to treat them fairly."

9. The remaining element of the assumed general criterion is the amount of restraint, actual or potential, which did take place.⁹ Here, again, we find that the natural symptoms of a suppression of competition did not exist. No one complains of any suppression or of any practices resulting therefrom; and this for the very good reason that there never was any competition to suppress. It is difficult to prove that defendants have put a burden upon that which never existed. Not only is the record barren of any suggestion that the Kanawha shippers ever had the benefit of any competition between the Central and the Hocking, but it affirmatively shows that during the ten years before 1910, competition was impossible, because the Hocking controlled everything; and that before 1900, it was impossible, because the Kanawha belonged to the Central.

It is certain, then, that the result which will condemn the agreement must be found in the suppression of "potential" competition, and we must ascertain what this means. In the Union Pacific case, the thought was applied with reference to undeveloped traffic from territories already reached by the two roads, and which traffic might grow into larger volume; but the same idea must extend to new and likely methods of competition

⁹ The Kanawha traffic to be divided was about twenty-five per cent. of the total traffic of the two Ohio roads. This appears only as to the Hocking; I assume a similar ratio on the Central. I reach this result by taking the figures in 1911 (Ex. 138) and excluding the south bound tonnage from the total of Kanawha and excluding the C. & O. tonnage from total Kanawha and total Hocking.

and even, in some instances, to the building of new roads or branches to make competitive territory out of that which has been tributary to one road only. Whether competition, between the roads now existing, in cutting rates, etc., is probable enough or would be serious enough under the facts of this case to be that potential competition which must be preserved, has been discussed. It is still possible that the Ohio road which saw the Kanawha sold away from it, would have built a new line to the Kanawha District even in spite of the great topographical difficulties. Such new road, apparently, could not have reached any mines now on the Kanawha, because there is room for no new track along the river next to these mines; but treating the district and not the individual mines as the shipping unit, it could have reached other parts and developed new mines. That it would have done so is, however, the merest surmise; it is not even probable, so far as the record informs us; and I can not condemn the joint Kanawha purchase because it has possibly prevented the building of another line in some unknown location at some vague future time. An arrangement which removes the motive for building a competing line can not, for that reason alone, amount to an unlawful forestalling of potential competition, unless such forestalling was a substantial and moving purpose of the arrangement, and unless the building of such other line was at least reasonably probable,—indeed, the latter condition covers both, because it could not be the main and sufficient motive, unless the new road was foreseen as probable.

Finally, in testing the actual results, we must look to the Kanawha shippers. All this controversy is to protect their interests,—and, of course, the correlative interests of the public which buys from them. Have the shippers been injured? Are their rights in jeopardy? On one hand, it appears that there is somewhat less of motive on the part of the Central and the Hocking to compete on a part of the through haul than there would be under certain other circumstances which never did exist, which would not have been a probable alternative, but which perhaps might have come into existence. I find nothing else to put on this side of the scale. On the other hand, it appears that the great trouble in coal ship-

ments is to get cars, and that the Kanawha, even when in combination with the Central and the Hocking, was poorly supplied with cars and served its shippers poorly. It was greatly interested in its own coal companies, and it would have supplied them even if it did not impartially distribute all the cars it could get. Under these conditions, coal shipments from the mines along the Kanawha amounted, in the last six months of 1909, to 36,000 cars. With the transfers in March, 1910, there came a new outlet to all the western C. & O. territory, and direct and close relations which made it to the interests of these two trunk lines to furnish cars to the Kanawha.¹⁰ It seemingly must have been due, at least in a large part, to these greater facilities that the shipments by the mines along the Kanawha had increased in the last six months of 1911, to 42,000 cars. This does not seem to indicate a substantial restraint of trade and commerce. It seems to me clear that the Kanawha shippers and their dependent public have been benefited by the transaction of March, 1910, taken as a whole, and that interstate trade and commerce have been promoted thereby;¹¹ while the only restraint affecting such shippers or such commerce is theoretical rather than actual, and such as it is, arises, out of a natural, if not necessary, incident of the main transaction.

10. There remain for consideration two further suggestions. It is said that the Hocking and the Kanawha are competing roads, and, hence, that the former can not take part in managing the latter, either directly or through the instrumentality of the Hocking's chief stockholder. I am not satisfied that these two roads are, in any fair sense, competing. That portion of the Kanawha extending from Hobson north forty miles to Corning, and

¹⁰ Up to July, 1909, the Hocking, Central and Kanawha cars were pooled and used interchangeably on these roads. During the nine months intermediate the end of this pooling arrangement and May 1, 1910, the date of full effect of the March contracts, the Central furnished to the Kanawha an average of 266 cars per month. During the same months of 1910 and 1911, it so furnished an average of 1466 per month.

¹¹ In 1909, the New York Central lines were furnishing 1600 cars per month to the Central; in 1911, 8300 cars per month. Coal production at the mines on the Central increased 500,000 tons for 1911 over 1909.

that portion of the Hocking extending from Logan south fifty miles to the river, are substantially parallel and twenty miles apart. There is some traffic to and from two or three small towns, Pomeroy, Middleport and Gallipolis, but the Kanawha does not reach these towns with its own track, and runs to them over the Hocking under a trackage contract which does not permit it to compete with the Hocking, except by the latter's sufferance. A small amount of coal is produced at some mines along the southern part of the Hocking River Division. The Kanawha might, by building its own spurs and branches, reach these three towns and these mines, but the whole of the traffic so reachable and as to which, theoretically, there might be competition, is negligible both in percentages and in total volume; neither is any reason shown to anticipate increase.

The relative positions of the Hocking and the Kanawha are not those of parallel and competing roads, but those of connecting and continuing roads having an end overlap. It is, in principle, though not in degree, as if the New York Central ran from the east to Niagara Falls through Buffalo, and the Michigan Central, from the west, to Buffalo, through Niagara Falls. Here would be, from Buffalo to Niagara Falls, two parallel roads, and they might compete for the freight originating at intermediate points. This could hardly be thought sufficient to deprive these two roads of their substantially connecting, rather than competing, character. So here, one looking at the map must, I think, observe that the Hocking and the Kanawha form substantially a connecting and continuing line from Gauley Bridge to Lake Erie, and do not lose this character because a branch or spur of the Hocking Toledo-Athens main line branches off at Logan, parallels the north end of the Kanawha and strikes it again at Kenaua.

It is true the Ohio court made a finding that these roads were parallel and competing, but the court was considering that portion of the Kanawha north of the river, and not, as we must do, the entire road; and also was treating the Kanawha as part of one system with the Central, a thing which we now can not do. That court was also considering intrastate commerce, as to which the conclusion of fact might well be different from

the proper conclusion regarding the immense volume of traffic involved under this record.

11. It is also said that the C. & O. and Kanawha are competing roads, and, hence, the former can not take part in the management of the latter. The roads are parallel from Gauley Bridge to Charleston, a distance of thirty miles along opposite sides of the Kanawha River. The mines on one side ship over the Kanawha; on the other side, over the C. & O. On neither side can they practicably reach the other railroad. The cost of crossing the river would be prohibitive. On neither side could another railroad track be built, the river valley being, at many places, a mere gorge. From Charleston to the Ohio River, the courses are generally divergent, one tending north, the other west. Charleston is a common point, and there should be, at this point, competition for freight originating at Charleston or coming in over the Coal and Coke Railroad and destined for the northwest. The interest of the C. & O. in the Kanawha would theoretically tend to restrict this competition; though the tendency would be imperfect, because over its own lines the C. & O. would get the entire haul to Chicago, while the other way, it would be interested in half the profit on the haul from Charleston to Armitage, and half of the volume of the traffic from Armitage to Toledo. One common point, with the amount of traffic existing at Charleston, would, in any event, be hardly sufficient to give a competing character to these railroads, but even if the theoretical but imperfect tendency to limit this competition could ever sufficiently invalidate an interest by one in the other, yet, in this case, such tendency must yield to the undisputed testimony, which is that the competition at Charleston between the soliciting agents has continued active and vigorous since March, 1910, as before.

The map also suggests that control of the Kanawha might be used to block the making of a through line from the seaboard to the lakes, by way of the Virginian, the Kanawha and the Central, which through line would, as a whole, compete with the C. & O. It is sufficient to say of this suggestion that no such issue is suggested by any pleading, and that the Lake Shore, in purchasing its

interest in the Kanawha, guarded against interference by the C. & O. with such possible future plan.¹²

Upon the whose case, I see two great shipping districts with interests involved,—the Hocking Coal District and the Kanawha Coal District. The Hocking shippers were subject to a monopolistic combination of all transportation facilities; they now have these facilities divided between two trunk lines, wholly independent of each other, as to competition between which there exists no obstacle which a court can remove. The Kanawha shippers were always subject to that monopoly which results from having only one railroad outlet; this has been neither increased nor diminished; but by the alliance between their railroad outlet and two strong lines the shippers can reach much new territory, and the outlet has its facilities and usefulness much increased. As to the one feature (joint Kanawha control), in which the position of the shippers might be better, we are asked, it seems to me, to create competition.

Sherman T. McPherson, United States Attorney, and O. E. Harrison and John L. Lott, Special Assistants to the Attorney-General, for the plaintiff.

Clyde Brown, Chas. T. Lewis, John H. Doyle and Frank S. Lewis for The Lake Shore & Michigan Southern Railway Company, The Toledo & Ohio Central Railway Company, and The Zanesville & Western Railway Company.

Lawrence Maxwell, H. T. Wickham and A. C. Rearick for The Chesapeake & Ohio Railway Company.

Lawrence Maxwell, James H. Hoyt and John F. Wilson for The Hocking Valley Railway Company.

Talfourd P. Linn for The Kanawha & Michigan Railway Company.

William O. Henderson for Sunday Creek Company.

¹² Indeed, the entire subject-matter of this numbered paragraph should be disregarded for the same reason. Paragraph twenty of the bill limits the issue to the charge of a continued combination between the Hocking, the Central, the Zanesville and the Kanawha. It is important to know what the C. & O., as owner of the Kanawha, is doing with the Kanawha; but, to the issue tendered and made, it is immaterial whether the C. & O. is under disability to become the owner of the Kanawha.

DECREE.

[Filed March 14, 1924.]

Facts concerning progress of the case between the first hearing and the ultimate submission for decree:

This cause was heard before the Circuit Judges of the Sixth Judicial Circuit (pursuant to certificate of the Attorney-General of the United States, filed herein according to Act of Congress of February 11, 1903). The court held that the plaintiff was entitled to relief, but reserved certain questions touching the nature and extent hereof. After hearing upon these questions, plaintiff was permitted to file an amendment to its bill and to bring in additional defendants, named below. Forms of decree were presented, but they indicated that both sides were in some respects claiming relief which could not be granted. With a view of eliminating these difficulties, a memorandum opinion was filed. Thereafter, counsel for the plaintiff, and counsel for three of the defendants, the Lake Shore, the Toledo & Ohio Central, and the Zanesville & Western, each submitted a form of decree; and counsel for two of the defendants, The Hocking Valley and the Chesapeake & Ohio, presented suggestions as to certain provisions the decree should contain. Since then the Attorney-General of Ohio upon leave appeared, as a friend of the court, for the purposes only of calling attention: (1) to the pendency in the Court of Appeals of Franklin county, Ohio, of three actions in quo warranto: State, ex rel. against the defendant railways herein (some of such railway companies being defendants in the first of these actions, one in the second, and all in the third); (2) to the issues presented, which in the main concern the power of certain of the railway companies to hold stock in certain of the other railway companies and in the coal companies, and to the relief sought, under a statute of the State, called the "Valentine Anti-Trust Act"; and (3) to objections of the state to certain provisions of the last form of decree submitted, as stated, in the instant case on behalf of certain of the defendants, and also to the suggestions offered for others of the defendants touching the form of decree to be entered herein.

I.**Findings of Fact.**

Plaintiff's counsel request the court to file separate

findings of fact, and counsel for defendants object thereto; notwithstanding Equity Rule 71, it is deemed permissible and proper in this case to accompany the decree by the following findings of fact:

(1) Original Defendants—Where Organized. The railroad companies named in the above recited title of the case are all Ohio corporations, except the Chesapeake & Ohio, which was organized under the laws of Virginia. The coal companies there named were organized: The Sunday Creek under the laws of New Jersey, and the other two under the laws of West Virginia.

(2) Defendants Brought in Under Amendment to Bill. The Central Trust Company of New York, as trustee under the first consolidated mortgage of the Hocking Valley Railway Company; the said Central Trust Company, as trustee of stock in The Sunday Creek Company under the agreement of April 30, 1908; John H. Doyle, as trustee of stock in The Sunday Creek Company under the agreement of April 30, 1908; J. P. Morgan & Company, as trustee of the stock of the Kanawha & Hocking Coal & Coke Company and of the Continental Coal Company, to secure agreement for division of coal traffic, such trustee, however, having resigned and the Bankers Trust Company of New York having been duly substituted in the place and stead of J. P. Morgan & Company as such trustee; these additional defendants have appeared and filed separate answers, setting up their respective claims as trustees, and, with the original defendants, have stipulated that the cause should be submitted upon the proofs previously offered.

(3) The Railroads. The Lake Shore extends from Buffalo to Chicago, passing through the northerly portion of Ohio by way of Toledo, and has a number of intermediate branches. Connection is maintained in Toledo, though not described, between the Lake Shore and the Toledo & Ohio Central, and also the Hocking Valley. A large majority of the capital stock of the Lake Shore is owned by the New York Central. The Chesapeake & Ohio extends from Old Point Comfort to Cincinnati, running (in West Virginia) along the southerly side of the Kanawha River from Gauley (connecting with Gauley Bridge and Charleston) to Scary, thence (leaving the Kanawha River) westwardly to the Ohio River at Guyan-

dotte, and thence along the south side of the Ohio River to Covington, Kentucky, where it crosses the river to Cincinnati; it owns a great majority of the stock of the Chesapeake & Ohio Railway of Indiana, and so reaches Chicago. Two of the remaining railroads are entirely within Ohio, running generally in a north and south direction, viz., the Hocking Valley from Toledo by way of Fostoria, Columbus, Logan (Gallipolis, Kanauga and Hobson to Pomery (Kanuga being on the Ohio River opposite Point Pleasant, West Virginia), with a branch line from Logan to Athens; and the Toledo & Ohio Central with two divisions running from Toledo, the easterly one by way of Fostoria and Thurston to Corning, and the other by way of Columbus to Thurston. The Kanawha & Michigan extends south from Corning by way of Athens and Hobson to Kanauga, where it crosses the Ohio River to Point Pleasant, and continues thence along the northerly side of the Kanawha River by way of Charleston to Gauley Bridge, using the tracks, however, of the Hocking Valley between Hobson and Gallipolis. The Zanesville & Western is also entirely within Ohio, and extends east from Thurston to Zanesville. This sufficiently shows the geographical relations and the common termini and common points of connection as respects these railroads.

(4) The Coal Fields Directly Affected. The coal lands tributary to the three exclusively Ohio railroads, are situated in that state and well known as the Hocking Valley coal fields and a portion of those fields, but principally coal lands situated in West Virginia, are tributary to the Kanawha & Michigan Railroad, and these latter coal lands are in the well known Kanawha coal district.

(5) Coal Traffic, and Other Coal Fields Involved. The principal freight traffic of all the railroads mentioned, except the Lake Shore, is bituminous coal. The principal coal mines along the Chesapeake & Ohio are in the Kanawha, New River and Big Sandy coal district of West Virginia and Kentucky. A substantial part of the freight traffic of the Lake Shore is bituminous coal, originating not only in the Hocking Valley coal fields and the Kanawha coal district, but also on two or more of its branch roads connecting with coal fields situated in other portions of Ohio and in Pennsylvania. Coal derived

from these various fields is carried over the defendant roads and their connections to destinations, some of them common destinations, situated in states (including lake ports therein) other than the states in which the coal originated.

(6) Competitive Conditions. (a) Between 1890 and 1899, through ownership of stock and guaranty of bonds of the Kanawha & Michigan, the Toledo & Ohio Central controlled and operated that line in connection with its own. During that period the Hocking Valley and the Toledo & Ohio Central were naturally competing lines, and, as far south as the Ohio River, were parallel lines. Aside from the Kanawha & Michigan, the Hocking Valley, as far south as Athens, and the Toledo & Ohio Central are parallel and naturally competing roads. Prior to and in 1899, free competition was maintained between the Toledo & Ohio Central and the Kanawha & Michigan, on the one hand, and the Hocking Valley, on the other, as respects the coal traffic derived from the Hocking Valley coal fields and the Kanawha coal district, as well as of other traffic carried over their lines; this traffic included both interstate and intrastate shipments.

(b) The Kanawha & Michigan is dependent for the movement of its traffic north of Corning upon either the Toledo & Ohio Central or the Hocking Valley or both. The Kanawha & Michigan, if used as a carrier exclusively in connection with either the Toledo & Ohio Central or the Hocking Valley, would be a natural competitor of the one or the other of such roads according as the connection and use might be maintained; and the capacity of the Toledo & Ohio Central to increase its competing traffic is enhanced by its connection at Thurston with the Zanesville & Western. The competitive conditions naturally existing between the Hocking Valley and the Toledo & Ohio Central would manifestly be preserved by traffic derived from the Kanawha & Michigan, if that line were owned and operated independently of either of the others.

(c) What is known as the southern division of the Hocking Valley, to-wit, the portion between Logan and Pomeroy, has not since 1899, while the Kanawha & Michigan has, been improved in grades, roadbed and bridges, equipment and freight traffic which have been introduced since that year; and, further, it is shown that the con-

figuration of the territory adjacent to the Kanawha River is such as reasonably to prevent construction of a track additional to that of the Kanawha & Michigan on the one side, or the tracks of the Chesapeake & Ohio on the other as far westwardly as Scary. It is not shown, however, that construction of an independent connection is impracticable by a line uniting with the Chesapeake & Ohio at Scary or at some point in its existing tracks between Scary and Guyandotte, and running thence northwardly either to Gallipolis or Kanauga; nor that the southern division of the Hocking Valley cannot reasonably be improved and utilized for heavy equipment and traffic; that the division was an essential part of the Hocking Valley during the period of free competition mentioned.

(7) Railroad Reorganization of 1899. The immediate predecessor of the Hocking Valley Railway Company was the Columbus, Hocking Valley & Toledo Railway Company. A plan of reorganization of the latter was entered into under date of January 4, 1899. After judicial sale of its property, the purchasing trustees conveyed the railroad property to the Hocking Valley, and the title thereto is still in that company. It was part of this plan to have the Hocking Valley acquire interests in the Toledo & Ohio Central Railway Company and the Columbus, Sandusky & Hocking Railroad Company (predecessor of the Zanesville & Western), and in February, 1899, the Hocking Valley reserved 50,000 shares of its preferred and 50,000 shares of its common stock for the purpose of acquiring such interests. The purchases of stock in the Toledo & Ohio Central were made in the name of a New Jersey corporation, called the Middle States Construction Company. In 1899 and 1900 the Hocking Valley purchased the bonded indebtedness of this construction company; and this indebtedness was secured by and convertible into stock in the Toledo & Ohio Central, under a deed of trust of the Construction Company to the Central Trust Company or New York. In 1899 and 1900, the Construction Company acquired the controlling interest in the capital stock of the Toledo & Ohio Central. The Hocking Valley in 1902, purchased all the stock in and all the bonds of the Zanesville & Western, which, through judicial sale, had acquired the portion of the Columbus, Sandusky & Hocking Railroad extending from Thurston

to Zanesville with certain branch lines. From 1902 to 1909 the president and general manager of the Hocking Valley, as well as other officers of the company selected later, occupied corresponding positions in the Toledo & Ohio Central and the Zanesville & Western. The control thus acquired by the Hocking Valley carried with it also the control of the Kanawha & Michigan, through the control of the latter by the Toledo & Ohio Central, before mentioned. In 1903 the Hocking Valley exchanged its holdings of stock and bonds in the Zanesville & Western for the shares held by the Toledo & Ohio Central in the Kanawha & Michigan; and, apart from influence exercised by certain trunk lines, the Hocking Valley remained in control of this system of exclusively Ohio railroads and the Kanawha & Michigan until March, 1910.

(8) Certain Trunk Lines Purchase Majority of Hocking Valley Stock.

In June, 1903, five trunk line railroads, viz., Lake Shore & Michigan Southern Railway Company, Erie Railroad Company, Baltimore & Ohio Railroad Company, Chesapeake & Ohio Railway Company, and the Pittsburgh, Chicago, Cincinnati & St. Louis Railway Company, purchased a majority, to-wit, 69,242 shares, of the common capital stock of the Hocking Valley, and each of the purchasing companies obtained a one-sixth interest in such shares, except the Pittsburgh, Chicago, Cincinnati & St. Louis Railway Company, which asquired two-sixths. An advisory committee composed of representatives of the trunk lines with the president of the Hocking Valley, controlled the financial affairs of the Hocking Valley and of certain coal companies (mentioned below) in which it was interested. Among the results thus reached were the incorporation of the Sunday Creek Company for the purpose of handling the coal interests of the Hocking Valley, and the maintaining of a general operating system that was satisfactory to the trunk lines. One of the features of this operating system was to restrict rail connections with coal mines to such as were already in operation, and to refuse and by litigation to contest applications for rail connections with new mines. These conditions were in practical effect continued until March, 1910.

(9) Railroad Acquisition and Control of Coal Proper-

ties. Pursuant to the plan of reorganization of 1899, the Buckeye Coal & Railway Company was incorporated under the laws of Ohio, and the Hocking Valley and this coal company joined in the execution of a mortgage under date of March 1, 1899, providing for the issue of first-mortgage bonds in the sum of \$20,000,000, and secured by the properties acquired by such companies. This coal company was organized for the purpose of obtaining the coal properties of the Hocking Coal & Railroad Company, and these properties were bid in and conveyed to the Buckeye Coal & Railway Company by the purchasing trustees at the judicial sale before mentioned, and such trustees received from the new coal company 2495 shares of its total capital stock of 2500 shares, and thereupon entered into a traffic agreement with the Hocking Valley to secure rail connections between coal mines and the main railroad line and also coal transportation, and the trustees at the time turned over the stock in the coal company to the Hocking Valley. Out of the sales proceeds of the first mortgage bonds mentioned, the Hocking Valley acquired the stock and properties of four other coal companies, and also a large majority of both the preferred and common shares of stock in the Sunday Creek Coal Company.

A different method was adopted for securing control of the properties of the Kanawha & Hocking Coal & Coke Company and the Continental Coal Company, as also of a number of other coal properties. The Toledo & Ohio Central Railway Company and the Hocking Valley Railway Company entered into a contract to guarantee the first-mortgage bonds of the coal companies last named; and the last named railway companies and coal companies, including the Kanawha & Michigan Railway Company, agreed that the traffic derived from the property or mines of the coal companies should be equally divided between the Toledo & Ohio Central Railway Company and the Hocking Valley Railway Company; and, for the purpose of securing the performance of such agreement and also of the terms and conditions of a certain mortgage made by the Kanawha & Hocking Coal & Coke Company to the Morton Trust Company, Trustee, of New York, dated July 1, 1901, and of another mortgage made by the Continental Coal Company to the Standard Trust

Company, Trustee, of New York, dated February 1, 1902, all the capital stock of each of these two coal companies (except certain qualifying shares) was placed in the name of and deposited with J. P. Morgan & Company of New York, as trustee. This stock was to be held by such trustee (but is now held by the successor trustee, the Bankers Trust Company, a defendant herein, as before stated) until such time as all the conditions of the agreement and mortgages aforesaid, respectively, should be complied with; and the beneficial interests in the capital stock of the said coal companies are now owned and held by the Sunday Creek Company. Further (the Toledo & Ohio Central owned the entire capital stock of the Imperial Coal Company and also the National Coal Company.

(10) Merger of Coal Interest into Sunday Creek Company. (a) The holdings in these coal properties were subsequently merged and placed in the Sunday Creek Company (not the Sunday Creek Coal Company). The Sunday Creek Company was organized under the laws of New Jersey with a capital stock of \$4,000,000; and it now controls more than 100,000 acres of land situated in the Hocking coal fields and the Kanawha coal district, together with about fifty coal mines and about three hundred and fifty coke ovens, which are tributary to the exclusively Ohio railroads before named and the Kanawha & Michigan. When the Sunday Creek Company was incorporated, the Hocking Valley owned \$3,236,300 par value of stock in the Sunday Creek Coal Company and exchanged said stock for a like amount in the Sunday Creek Company, and the Toledo & Ohio Central owned \$513,700 par value of preferred and common stock in the Sunday Creek Coal Company and exchanged such stock for a like amount of stock in the Sunday Creek Company—a total of \$3,750,000; and on April 23, 1906, twenty-four hundred and eighty-eight shares of the Sunday Creek Company were issued in a single certificate in the name of the Central Trust Company of New York to prevent their issue except upon its approval, the remaining twelve shares having been issued to qualify directors.

(b) Special Trusts Created Respecting Shares in Sunday Creek Company. The Toledo & Ohio Central caused its shares in the Sunday Creek Company to be issued in

the name of John H. Doyle, Trustee; and in April, 1908, just before the commodities clause of the Hepburn Act was to take effect, and in view of doubts as to its constitutional validity, the company entered into an agreement with him, by which the stock was in terms sold to him as trustee for the stockholders of the company, in whose names its stock might from time to time be registered and to whom dividends should be paid, and the certificate of stock and the contract have ever since been in his possession. On April 30, 1908, another contract similar to the one just mentioned was entered into between the Hocking Valley and the Central Trust Company of New York, respecting the shares of the former in the Sunday Creek Company. After reciting, among other things, that all of these shares with others were pledged to the trustee as collateral security for the bonds issued under the first consolidated mortgage of the Hocking Valley and the Buckeye Coal & Railway Company, it was in terms agreed that the Hocking Valley had sold and assigned to the trustee all its interest in such shares of stock, subject to the lien of the mortgage and the rights of the bondholders thereunder, in trust, for the proportionate benefit of the holders of record of the stock of the Hocking Valley and for any distribution of its assets; that the trustees should have the right to vote the shares, to collect dividends, and (if the company was not in default under its mortgage) to distribute them among the holders of the stock. Further provision was made, common to both of such trust agreements, that in the event the Supreme Court should hold the commodities clause of the Hepburn Act constitutional, the trustees should sell such shares of stock and distribute the proceeds (subject to the lien of the mortgage before mentioned respecting the Hocking Valley shares) among the registered stockholders in the Toledo & Ohio Central and the Hocking Valley respectively. However, this provision has never been executed; the trustees still hold the legal title to the stock.

(11) The March Agreement. (a) For the avowed purpose of complying with the judgment in quo warranto of a Circuit Court of Ohio (in effect ousting the Hocking Valley from its control of and relations with the Toledo & Ohio Central, Zanesville & Western, Kanawha & Michi-

gan, and certain of the coal companies before named), the Lake Shore and the Chesapeake & Ohio entered into an agreement in March, 1910, pursuant to which the Lake Shore acquired all the stock in the Toledo & Ohio Central, 45,100 shares (a majority) of stock in the Kanawha & Michigan, 5137 shares of stock in the Sunday Creek Company, and the entire capital stock in and all the bonds of the Zanesville & Western, at an aggregate purchase price of \$10,197,874.67, and obligated itself to make provision for loaning to the Sunday Creek Company as needed, and on its notes, \$1,143,110.50; and thereupon it sold to the Chesapeake & Ohio 22,550 shares of the Kanawha & Michigan for \$1,623,600, and 11,540 shares of the Hocking Valley for \$1,384,800 (the latter stock being the one-sixth interest that the Lake Shore had acquired through the purchase made by the trunk lines). The Chesapeake & Ohio then acquired the holdings of the other trunk lines in Hocking Valley stock, which (with the one-sixth it had previously obtained through the trunk lines purchase and the one-sixth derived under the March agreement) gave to the Chesapeake & Ohio 69,240 shares of such stock. The preferred stock of the Hocking Valley was retired in April, 1910, leaving 110,000 shares of common, of which the Chesapeake & Ohio now owns (through increase of its holdings) 88,258 shares; and that company and the Lake Shore, through additional purchases now each own 40,271 shares of the stock of the Kanawha & Michigan (being 80,542 of the total capital of 90,000 shares). The interests of the Lake Shore and the Chesapeake & Ohio in the Sunday Creek Company (through their respective holdings in the Toledo & Ohio Central and the Hocking Valley) now cover its entire outstanding capital stock, subject to the trusts and pledge before stated.

(b) Certain other portions of the March agreement are in substance as follows: a further contract for twenty-five years was to be made, providing that the line of the Hocking Valley and the western division of the Toledo & Ohio Central, between their terminals at Toledo and their connections with the Kanawha & Michigan at Chauncey, might (for cost of maintenance and operating expenses according to joint uses) be used at the option of either for the movement of its through freight trains; that an addi-

tional contract should be made to protect the Toledo & Ohio Central and the Hocking Valley under their previous guaranty bonds of coal companies, given under agreement for an equal division of the coal traffic derived from the properties of such coal companies; and that an arrangement for distribution of the business, so far as could be legally made, should be effected to protect the interests of the Toledo & Ohio Central and the Hocking Valley respecting their guaranty of such coal bonds; that still another contract should be made "for trusteeing or otherwise jointly handling" the 45,100 shares in the Kanawha & Michigan. In case this stock was so placed in trust, provision was to be made for such trackage agreement with the Kanawha & Michigan as would protect the purchasing companies against loss of control of the property. Privilege was to be given, on request of either of the purchasing companies, to make certain connections between the Kanawha & Michigan railway and the Virginian railway or the Lake Shore or Chesapeake & Ohio the intent being that the lines of the Kanawha & Michigan could be used to the fullest extent by either of the purchasing companies in building up its interests either in local territory on the Kanawha & Michigan or in making through routes with connections beyond it, protecting, however, all the stockholders of that company. Provision was also made for acquiring all or part of the outstanding stock of the Kanawha & Michigan; for having that company purchase the securities of the Pomeroy Belt Railway Company, and indemnifying the Hocking Valley against liability assumed by it in the purchase thereof, and granting to it a trackage right over such belt road, etc., and for securing to the Hocking Valley trackage over the Kanawha & Michigan between Athens and Hobson, to accommodate Hocking Valley through business from or to its line between Gallipolis and Pomeroy. The whole agreement was made subject to a condition that the other roads embraced in the trunk lines purchase should sell their holdings in the stock of the Hocking Valley to the Chesapeake & Ohio.

(12) Conditions Inaugurated and Maintained Under the March Agreement. Since the March agreement separate and distinct officers and offices of the railroads respectively, have been selected and maintained; and this

is true also of the Sunday Creek Company. The managerial officers of the three exclusively Ohio railroads, and also of the Kanawha & Michigan and Sunday Creek Company, were, after the execution of the March agreement, instructed to exercise their own judgments respecting the interests they severally represented. Some of the provisions of that agreement have not been formally observed. Thus, the additional contract which was intended to provide for an equal division between the Toledo & Ohio Central and the Hocking Valley, of the coal traffic and business derived from the Kanawha & Michigan, has not been prepared and signed. And the independent coal operators in the coal fields in question have received greater concern and accommodations at the hands of the railroads since the agreement than they were given before. Nevertheless, since then there has not been effective competition among these exclusively Ohio railroads, including the Kanawha & Michigan, as respects the coal traffic derived either from the Sunday Creek Company or from other shippers of coal mined in the coal fields tributary to such railroads; nor has the Sunday Creek Company done anything to induce or promote competition among such railroads. The coal traffic of the Chesapeake & Ohio, destined northwardly by way of Gauley and Gauley Bridge, and also that of the Hocking Valley originating on its line between Gallipolis and Pomeroy, have been carried over the Kanawha & Michigan from the respective connections at Gauley Bridge and Hobson; and all such traffic, including that originating on the Kanawha & Michigan and the exclusive Ohio railroads, destined to Toledo, has been carried northwardly from Chauncey to the terminals in Toledo over the tracks embraced in the reciprocal trackage arrangement called for by the March agreement; and a substantially equal division of the coal traffic derived from the Kanawha & Michigan Railway Company has been maintained between the Hocking Valley and the Toledo & Ohio Central. In short, the practical operation and uses of the three exclusively Ohio railroads and the Kanawha & Michigan, as well as the Sunday Creek Company, have closely corresponded with the terms of the March agreement and (apart from the added Chesapeake & Ohio traffic) with such operation and uses prior to that agreement.

(13) Intent and Effect of the Reorganizations of 1899 and its Subsequent Development, and also of the March Agreement. The union of interests designed by and brought about under and pursuant to the reorganization agreement of 1899, was intended to and did combine and monopolize the railroad and coal stocks and properties there involved in restraint of trade among the states; and the transactions that have since been carried out in accordance with the March agreement, and the union of interests there re-arranged, with the concert of action occurring since then among the companies in control and those engaged in the operation of the roads and the coal interests involved, have in effect, though in different form, operated to continue the substantial evils of the old combination and monopoly, and so have resulted in unreasonably restraining trade among the states.

II

Decree.

This cause came on to be heard before Circuit Judges Warrington, Knappen and Denison, upon the bill, the amendment thereto, the several answers and replications, the exhibits and evidence offered by the respective parties (defendants producing certain witnesses who testified in Court) and the arguments of counsel; upon consideration whereof, and being fully advised in the premises, the Court, on the issues joined, adjudges and decrees that the acts and transactions committed and carried into execution in pursuance of the reorganization agreement and otherwise, until the date of the agreement of March, 1910, were, and, further, that the acts and transactions committed and carried out in accordance with that agreement, in connection with the course of business pursued since its date, by and among the defendants and those in their control respectively, were and are, as the same are in substance stated with respect to both periods, in the foregoing findings of fact, in violation of the Act of Congress of July 2, 1890; and, in order effectively to dissolve the combination now existing, it is further ordered, adjudged and decreed as follows:

(1) Sale of Railway Companies' Interests in Stock of Sunday Creek Company. That the equity and interest of the Lake Shore & Michigan Southern Railway Company, the Toledo & Ohio Central Railway Company, the

Chesapeake & Ohio Railway Company and the Hocking Valley Railway Company, and each of them, in the capital stock of the Sunday Creek Company, shall be disposed of by absolute sale. That the legal title to said stock held by the trustees, viz., John H. Doyle and the Central Trust Company, under the certain agreements of April 30, 1908, in substance described in the findings of fact aforesaid, be included in said sale, and that said sale be made free from every interest or claim of said trustees or either of them, and of any and all the railway companies last named, and of the stockholders of each and all of them.

That said the Hocking Valley Railway Company, the Toledo & Ohio Central Railway Company, the Lake Shore & Michigan Southern Railway Company, and the Chesapeake & Ohio Railway Company, each and all of them, be and they hereby are perpetually enjoined from directly, or indirectly, owning, holding or acquiring any stock in said Sunday Creek Company, or in any of the companies hereinbefore named, the property of which is owned, leased or controlled by said Sunday Creek Company, intending hereby to impose an absolute prohibition against said railway companies, or any of them, owning or controlling any shares of stock in said Sunday Creek Company, or otherwise owning or controlling, directly or indirectly, any interest in any of the coal properties in which that company is interested; and that the Sunday Creek Company be and it hereby is perpetually enjoined from directly, or indirectly, permitting any share or shares of its capital stock to be voted by or on behalf of any of the said railway companies for any purpose whatever, at any meeting or otherwise of the stockholders of said Sunday Creek Company, or permitting any of such railway companies to exercise any control over or to have anything to do with the management of said Sunday Creek Company, and likewise from paying any dividends to or for any of such railway companies.

That for the purpose of enabling said railway companies and said trustees to comply with this decree respecting the sale of stock in the Sunday Creek Company, they and each of them shall have two months from the entry hereof so to comply herewith; and if said railway companies and said trustees are able to sell said stock, they shall be and are hereby authorized and empowered

to sell the same, free of any claim, lien or equity of any of the parties to this suit, including the lien of the Central Trust Company of New York, as trustee under the consolidated mortgage made by the Hocking Valley Railway Company to it, referred to in the findings of fact aforesaid, and freed from any equity in the stockholders or any of them, of said The Hocking Valley Railway Company, or said The Toledo & Ohio Central Railway Company.

That if within said period of two months from the entry hereof, said defendants are able to comply with this decree by the absolute sale of said stock, they and each of them shall, before concluding such sale, report to this court the manner of such compliance, the name of the proposed purchaser, and tendering such purchaser before the court for examination, and the said sale and all proceedings toward the compliance with this order, shall be subject to approval, rejection or modification by the court.

That if within said period defendants do not comply with the decree in this respect, and report the same to the court for its action thereon, as above provided, then the court will otherwise provide for the sale of such stock, unless for good cause the court further extends said time, by such action as it may deem necessary and adequate to such purpose, either through appointment of a master to make such sale or of a receiver to take possession of said stock, with the power to sell and dispose of the same, or in such other manner as will enforce compliance with this decree in this respect.

(2) That the Bankers Trust Company, as successor trustee to J. P. Morgan & Company, be, and it hereby is, perpetually enjoined from in any manner undertaking to enforce, or claim any rights or benefits under, the provisions of the contracts referred to in the findings of fact and relating to the equal division of the freight traffic derived from the mines or property of, or formerly held by, either the Kanawha & Hocking Coal & Coke Company or the Continental Coal Company or both; and the defendant railway companies herein, and each of them, are also perpetually enjoined from in any manner undertaking to carry out the provisions of such contracts.

(3) March agreement annulled. That the agreement

entered into on or about March 10, 1910, between the Lake Shore & Michigan Southern Railway Company and the Chesapeake & Ohio Railway Company, in substance set out in the findings of fact aforesaid, be and the same is hereby wholly annulled; and said railway companies, and each of them, are hereby perpetually enjoined from executing or further carrying out any of the provisions or covenants of said agreement; provided, that nothing in this paragraph shall be construed as intending to determine any question of corporate power of either of such companies, at the date of the March agreement, or since then, to purchase or hold any of the stock or bonds acquired in pursuance of said agreement, or as intending to disturb such titles thereto as were in fact acquired, except only as respects the stock purchased and now held in the Kanawha & Michigan Railway Company.

(4) Disposition of stock in the Kanawha & Michigan Railway Company. That the ownership of the Lake Shore & Michigan Southern Railway Company and the Chesapeake & Ohio Railway Company (although not in form joint, but separate) in the stock of the Kanawha & Michigan Railway Company, and the resulting control of the latter company inhering in such holdings, were acquired in violation of the laws of the United States and are unlawful; and in order to avoid further infraction of the Federal law in this respect, either the stock so held by the Chesapeake & Ohio Railway Company shall be sold and transferred to the Lake Shore & Michigan Southern Railway Company, or such holdings both of said companies shall be disposed of by absolute sale, in manner following:

(a) If the Lake Shore & Michigan Southern Railway Company shall elect so to do, upon its own responsibility as to its corporate authority to acquire and hold the same, it may, within forty days from the date hereof, propose in writing to pay for the stock in the Kanawha & Michigan Railway Company so held by the Chesapeake & Ohio Railway Company a sum equal to one-half the total price paid therefor by both companies, without interest, or such other sum as the two companies shall agree upon, either in cash or upon time and terms of security satisfactory to the Chesapeake & Ohio Railway Company; and such proposal, whether it be the specific sum above

stated or an agreed sum, including all terms and conditions of the proposal, shall be submitted to the court for approval, modification or rejection; but no proposal involving a trackage privilege in favor of the Chesapeake & Ohio Railway Company in or over any portion of the tracks of the Kanawha & Michigan Railway Company will be considered save only on cause shown to meet temporary exigency; but if the Lake Shore & Michigan Southern Railway Company shall within twenty days from the date hereof file with the court a written refusal to make such proposal, or failing so to do and also, failing within the period of forty days before fixed, to present any proposal for the purchase of such stock, then and in either such event:

(b) Said the Lake Shore & Michigan Southern Railway Company and the Chesapeake & Ohio Railway Company shall thereupon comply with the requirement of this decree respecting the absolute sale of their stock in the Kanawha & Michigan Railway Company; and they shall have sixty days from the date of the filing of such written refusal, or, in case written refusal is not filed, then from the expiration of the time so given to effect the purchase as aforesaid, to dispose of their said stock; and if the companies are able to sell the same, they shall be and are hereby authorized to sell it to any responsible railroad company, not a party to this suit and entitled to purchase and hold the stock; such sale shall be free of any claim, lien or equity, of any of the parties to this suit; but said selling company shall, before concluding the sale, report to this court all its terms and conditions, the name of the proposed purchaser, and bring such purchaser (through an authorized representative) before the court for examination; and the said sale and all proceedings looking to the compliance with this decree, shall be subject to the court's approval, modification or rejection.

That if within said period said companies do not comply with the decree in this respect and report the same to the court for its action thereon, as above provided, then, unless for good cause the time shall be further extended, the court will otherwise provide for the sale of such stock by such action as it may deem necessary and adequate to such purpose, either through appointment

of a master to make such sale, or of a receiver to take possession of said stock with the power to sell and dispose of the same, or in such other manner as will enforce compliance with this decree.

(c) That in case a sale of the shares of stock of the Chesapeake & Ohio Railway Company in the Kanawha & Michigan Railway Company shall be made to the Lake Shore & Michigan Southern Railway Company and such sale shall be approved by the court, then the Chesapeake & Ohio Railway Company shall be and it is hereby perpetually enjoined,—and in case such sale shall not be so effected and approved, then both of said companies, to-wit, the Lake Shore & Michigan Southern Railway Company and the Chesapeake & Ohio Railway Company, and each of them, shall be and they are hereby perpetually enjoined—, as respects the owning, holding, acquiring or controlling of any stock or interest in said Kanawha & Michigan Railway Company (and said last named company is in either such event also perpetually enjoined in respect of its capital stock and property) in the same manner and to the same extent in each and every particular as is above provided in relation to the capital stock and the management and control of the Sunday Creek Company and its property; and each and all of the provisions in paragraph one (1) of this decree (concerning Sunday Creek Company), in the respects mentioned, are hereby referred to, and so far as they can in effect be made applicable hereto, they shall be treated the same as if each were at large repeated and incorporated herein with respect to the several railway companies named in this paragraph.

(5) Nothing in this decree is intended or shall be construed to prevent any of the defendant railway companies from entering into agreements for the joint carrying of through traffic according as the same is or shall be permitted by the laws regulating common carriers of interstate commerce.

(6) Questions reserved as to certain reciprocal trackage use. All questions touching the continuance of the reciprocal trackage arrangement between Toledo and Chauncey or Armitage, as the case may be, are reserved until completion of terms of sale of stock in the Kanawha

& Michigan Railway Company according to the requirements of this decree.

(7) Further combination enjoined. That the parties defendant to this cause, each and all of them, are perpetually enjoined from carrying into further effect the combination adjudged unlawful in this cause, and from entering into or forming any similar combination, the effect of which will be to restrain commerce among the states, or to prolong the unlawful monopoly of such commerce, as adjudged herein, in violation of the Act of Congress approved July 2, 1890.

(8) That jurisdiction of this cause be retained by this court for the purpose of making such other and further orders and decrees as may be necessary to the due execution of this decree and the complete dissolution of the combination and monopoly herein condemned.

Dated March 14, 1914.

Certificate.

The United States of America, Southern District of Ohio, Eastern Division, ss.:

I, B. E. Dilley, Clerk of the District Court of the United States, within and for the District and Division aforesaid, do hereby certify that the foregoing is a correct copy of the original decree entered March 14, 1914, as the same appears on file and of record in the Clerk's Office of said Court, in the therein entitled cause.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, at the City of Columbus, Ohio, this 14th day of March, 1914.

B. E. Dilley,

Clerk.

(Seal)

By C. P. White, Jr.,

Deputy.

**OPINION ON PETITION OF HOCKING COMPANY
TO APPROVE SALE OF CERTAIN STOCKS
AND BONDS.**

[Filed July 30, 1914.]

Before Warrington, Knappen and Denison, Circuit Judges.

Per Curiam. The Hocking Company has presented for approval its contract with E. M. Poston for the sale

by it to him of its interests in the stock of the Buckeye Company and its stock and bonds of the Ohio Company. Notice has been given to all interested parties; and the Government, Mr. Poston, the Sunday Creek Company, and Mr. Jones, the owner of the Sunday Creek stock, have been heard by counsel. The proposed sale is to be made as a step in compliance with our decree of March 14, 1914. We shall not attempt to state the facts except by incidental reference; they are familiar to counsel; we summarize our conclusions.

1. The property now involved is of two classes, stocks and bonds. As to the stocks, it is to us clear that a sale must be had and no serious question arises concerning such necessity; as to the bonds, the Hocking Company does not concede its duty to sell, but it proposes to unite them in one sale with the stock of the same company, and it seems to assume that such a unity of sale is for its best interests. We cannot too often repeat that the prime purpose of our decree was to insure the complete separation of the railroad interests from the coal mining interests, so that the former should not and could not dominate the latter. The possibility that such control may be accomplished through ownership of mortgage bonds and the agency of the trustee or through a foreclosure and purchase, is more remote and contingent than the prospect that it would follow from stock ownership; but substantial domination in the former manner may be no less effective. We have not before us on this petition the ordinary case where a railroad owns a fraction of a bond issue of a coal company; here the railroad, as between itself and the coal company, owns all the stock and all the bonds of the latter. The trust mortgage securing the bonds is due and the coal company can pay nothing; an immediate foreclosure may occur; on a foreclosure sale no one could successfully bid against the bondholder; to enjoin the latter from bidding causes many complications; and these and other attendant conditions justify us in saying that the existing dual means of control,—through the stock and through the bonds,—are equally objectionable to the spirit and intent of our decree. It follows that we must adhere to our conclusion, formerly expressed, that these bonds as well as the stock must be sold.

2. The purpose to accomplish complete and immediate separation must sometimes yield temporarily to commercial and practical necessity. We recognized this fact in our treatment of the mortgage given by the Sunday Creek Company to the Hocking Company. Only because it seemed necessary to avoid a large loss we permitted the Hocking Company to assume and continue the relation of mortgage creditor to the Sunday Creek Company; but we inserted in the mortgage conditions minimizing the danger that the bondholder would indirectly control the mortgagor, and we directed that the bonds be disposed of by the Hocking Company within the shortest time consistent with obtaining a reasonable price. The Ohio trust mortgage and bonds must be dealt with in the same way. If the bonds could be sold outright for cash and without precipitating foreclosure of the mortgage and without great delay and the proceeds be paid over for the benefit of the Hocking Company under its pledge, that would be the simplest and clearest method and the one which we would direct. The petition now presented takes it for granted that this cannot be done without too great sacrifice, and that the Hocking Company can obtain the value of the pledged bonds only by substituting the proposed new income bonds secured by the proposed new trust mortgage. By this means the relationship of mortgage creditor to the Ohio Company,—which relationship the Hocking Company now has,—will not be destroyed but will continue; and this should not be permitted unless the advantage to be derived therefrom as compared with a cash sale is so great as to justify a temporary exception to the general principle of complete separation. In favor of the plan of the new mortgage also is the consideration that thereby an immediate foreclosure of the existing mortgage can be avoided. Upon the assumption that it will be satisfactorily made to appear to us that a cash sale involves too much sacrifice we proceed to examine the proposed contract; but before any final conclusion is reached or order entered, we will consider such showing as the Hocking Company may make by petition or affidavit regarding the necessity for a sale of the bonds otherwise than for cash. This showing may be presented to us on October 9, 1915, and

reasonable notice thereof should be given to all parties interested including the Sunday Creek Company.

3. There is no objection of Mr. Poston as a purchaser; there is no reason to suspect that he or the new company which he would control would be inclined to yield to domination by the Hocking Company. Upon the hearing, Mr. Jones offered to become the purchaser in place of Mr. Poston and to pay a larger price. This offer of a larger price raises no implication that it should be accepted; this hearing was not for the purpose of aiding the Hocking Company to escape from its contingent contract with Mr. Poston or for the purpose of helping it to get the highest price; that subject does not concern the court; but it is proper for us to say that we see no objection to Mr. Jones as a purchaser, and that if a contract of purchase should be made with him the fact that he also owns the stock of the lessee company will not be a reason for disapproval. We see no reason for thinking that the interests of the Hocking Company or of the Central Trust Company would or could be prejudiced by such common ownership. For the same reason the court is not concerned in the advisability of a number of provisions found in the contract or income mortgage and which were criticized on the hearing.

4. Being satisfied with the personality of the purchaser, and on the supposition that we may be satisfied of the necessity to approve a sale in exchange for income bonds instead of a sale for cash, we proceed to state certain changes which should be made in the contract and in the new trust mortgage in order to insure the greatest possible certainty that our underlying purpose will not be injured by permitting a substitution of the new mortgage for the old one.

(a) The contract and the income mortgage contemplate that the lien of the existing mortgage be preserved and that it may be foreclosed by or for the benefit of the purchaser. As the purchaser will practically own the property subject to the mortgage there can be no purpose in this contemplated procedure except to cut off intervening titles, and the Sunday Creek Company, holding a supposedly intervening lease, would be the obvious object of such foreclosure. We are not called upon to protect from existing valid liens the property of

the Sunday Creek Company nor Mr. Jones, who became the purchaser of its stock with our approval; but this approval was based upon the understanding that operation of the Sunday Creek property by him would be especially desirable procedure in the course of separating the coal operations from the railroad operations, and we cannot so soon look with particular favor on a plan calculated to disturb the effect of this understanding. Aside from that, we are not favorably impressed with the idea that this mortgage should be foreclosed. It is not clear how the preservation of this right to foreclose or its exercise can interfere with the present purpose of the court in exacting full compliance with the decree of March 14; and yet this right and its exercise suggest complications. For example, it might turn out that a purchase at a foreclosure sale by the Central Trust Company in the interest of the Hocking Company, would be thought essential to protect the income bonds. However improbable such a development may now seem, its possibility should be guarded against. If the preservation of this right of foreclosure was necessary in order that the existing bonds might bring a satisfactory price, perhaps it ought to be permitted unless we can see a clear reason to the contrary; but this is not necessary. A price higher than the contract price is obtainable, and with this provision eliminated. Since the opportunity offers, it seems safer to require that these bonds should be cancelled as soon as the Central Trust Company receives the bonds which it is to accept in substitution. We cannot see that the interest of either the Central Trust Company or the Hocking Company can be prejudiced by this requirement.

(b) While the income bonds are held by the Central Trust Company as collateral under the consolidated mortgage, if the trustee under the income mortgage should be called upon to take possession or to foreclose, it would be so far the representative of the Hocking Company as to give that company indirectly some measure of control of operation. No more feasible way of avoiding the difficulty occurs to us than to provide that while the Hocking thus continues to be interested, the mortgage trustee should not act in this direction without the permission of this court. Accordingly the income mort-

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gage should contain a provision that so long as any bonds thereunder are held by or for the ultimate benefit of the Hocking Company or its creditors, the trustee under such mortgage should take no step by way of taking possession or foreclosure, or in any way directed toward the management or control of the property, unless and until such step has been approved by this court and upon such conditions as this court may impose.

(c) The Buckeye stock and the Ohio stock are to be held and voted by the mortgage trustee for an indefinite time. So long as this situation continues and so long as the Hocking Company remains the beneficial owner of the income bonds, this action by the trustee could hardly be free from the Hocking influence. Accordingly the income mortgage should contain a provision that so long as the Buckeye stock or the Ohio stock remains in the control of the trustee thereunder, and so long as the Hocking continues interested in the income bonds, the trustee's action in voting or disposing of such stock shall be subject to such directions as this court may give. It is not intended that such directions must precede such action, but only that any party interested may complain to the court of such action which has been taken or may be contemplated, and thereupon the court may exercise control.

(d) All this action looks toward final and complete servance. Hence we cannot sanction an indefinite holding of these income bonds in the interest of the Hocking Company but they must be sold to some outside interest as soon as possible. Of course the proceeds will come, in place of the bonds, to the Central Trust Company as pledgee. It cannot now be finally determined just how long such a sale should be postponed in order to give fair opportunity to get a reasonable price. Following the plan adopted with reference to the Sunday Creek mortgage it should be provided that the bonds be sold within two years, unless it be made to appear that further time is necessary.

5. In these recent proceedings it has been brought to our attention that the Hocking owns \$190,000 of Kana-wha bonds. Upon the hearing of the present petition counsel for the United States orally suggested that there were other coal properties and interests still held by some

of the defendants in the principal case which under the decree it was their duty to sell. Upon the ninth day of October, 1915, we will hear any application which the Government's counsel desire to make upon any of these subjects. Suitable advance notice to all parties interested should be given so that there is opportunity for pleadings or affidavits in opposition and so that on that day all matters, if any there are, which require our attention in order to carry out the decree may be ripe for hearing and disposition.

J. W. Warrington,
L. E. Knappen,
A. C. Denison,

Circuit Judges.

**PETITION FOR THE SALE OF THE CAPITAL
STOCK AND BONDS OF CERTAIN COAL COM-
PANIES OWNED BY THE HOCKING VALLEY
RAILWAY COMPANY, AND THE TOLEDO &
OHIO CENTRAL RAILWAY COMPANY.**

[Filed October 9, 1915.]

The United States of America, respectfully represents.

That defendant, The Hocking Valley Railway Company, owns 2,495 shares (par value \$100) of the capital stock of The Buckeye Coal & Railway Company, being all of the issued capital stock of said Company, except 5 shares.

That said The Hocking Valley Railway Company, also owns, 1,999 shares of the total of 2,006 shares of the issued capital stock of The Ohio Land & Railway Company; 2,000 shares (the entire issue) of the capital stock of The Boston Coal Dock & Wharf Company; and 358 shares of the capital stock of The Raybould Coal Company.

That the said 2,495 shares of The Buckeye Coal & Railway Company, of the par value of \$249,500, the said 1,999 shares of The Ohio Land & Railway Company, of the par value of \$199,900, and the said \$200,000 of the capital stock of The Boston Coal Dock & Wharf Company, are deposited with the Central Trust Company of New York, Trustee, as collateral security for an issue of \$20,000,000 Hocking Valley Railway First Consolidated Mortgage, 100 year 4½% bonds.

That said The Hocking Valley Railway Company also owns bonds of the par value of \$190,000, issued by the Kanawha & Hocking Coal & Coke Company.

Petitioner further represents that the defendant, The Toledo & Ohio Central Railway Company, owns all of the capital stock of The Imperial Coal Company, amounting to \$300,000, and of The National Coal Company, amounting to \$160,000.

By Decree of this Honorable Court, entered March 14, 1914, the defendants, The Hocking Valley Railway Company, and The Toledo & Ohio Central Railway Company, are perpetually enjoined.

from directly, or indirectly, owning, holding or acquiring any stock in said Sunday Creek Company, or in any of the companies hereinbefore named, the property of which is owned, leased, or controlled by said Sunday Creek Company, intending hereby to impose an absolute prohibition against said railway companies, or any of them, owning or controlling any shares of stock in said Sunday Creek Company, or otherwise owning or controlling, directly or indirectly, any interest in any of the coal properties in which that company is interested (Decree, p. 22).

In its decision of July 30, 1915, on the two Petitions filed by the Sunday Creek Coal Company, this Honorable Court held that the Sunday Creek Company controls the properties of The Buckeye Coal & Railway Company, and of The Ohio Land & Railway Company, through leases.

The control of The Boston Coal Dock & Wharf Company, The Raybould Coal Company, and the Kanawha & Hocking Coal & Coke Company is set out in the Court's opinion of December 28, 1912 (203 Fed., 295.; pp. 303, 304); and the object of the Decree is fully stated by this Honorable Court at page 2 of its Opinion of July 30, 1915, on the Petition of The Hocking Valley Railway Company to approve the sale of certain stocks and bonds—

“We cannot too often repeat that the prime purpose of our decree was to insure the complete separation of the railroad interests from the coal mining interests, so that the former should not and could not dominate the latter.”

Wherefore Your Petitioner Prays, that the defendant, The Hocking Valley Railway Company, be required to sell, free from any claim, lien, or equity of any of the parties to this suit, including the lien of the Central Trust Company of New York, as Trustee under the Consolidated Mortgage made by The Hocking Valley Railway Company to it, and free from any equity in the stockholders, or any of them, of said The Hocking Valley Railway Company, and subject to approval, rejection, or modification by the Court, all of the capital stock in said The Buckeye Coal & Railway Company, in said The Ohio Land & Railway Company, in said The Boston Coal Dock & Wharf Company, in said The Raybould Coal Company, and also the bonds of said Kanawha and Hocking Coal and Coke Company, owned by said The Hocking Valley Railway Company.

That the defendant, The Toledo & Ohio Central Railway Company, be required to sell the shares of the capital stock of The Imperial Coal Company, and of The National Coal Company, owned by it, also on terms subject to approval, rejection, or modification by the Court.

If, upon hearing, it be found that any of the above named coal companies have been dissolved, and their coal properties or any part thereof, have been acquired, directly or indirectly, by any of the Railway Companies, defendants in this suit, that any such defendant Railway Company be required to sell any interest it may have acquired in any of said coal properties, on terms subject to approval, rejection, or modification by the Court.

That the defendant Railway Companies be required to sell any other coal properties owned by them, or by either of them, in which the Sunday Creek Company (now the Sunday Creek Coal Company) is interested, on terms subject to approval, rejection, or modification by the Court.

That if within a period to be fixed by the Court, defendants do not comply with the decree in this respect, and report the same to the Court for its action thereon, that the Court will otherwise provide for the sale of such stocks and bonds, or of such coal properties, unless for good cause shown, the Court further extends the time, by such action as it may deem necessary and adequate to such purpose, either through appointment of a mas-

ter to make such sale or of a receiver to take possession of said stocks and bonds, and said coal properties, with power to sell and dispose of the same, or in such other manner as will enforce compliance with the decree in this respect.

Stuart R. Bolin,
United States Attorney.
John L. Lott,
Special Assistant to the
Attorney General.

**ANSWER OF THE HOCKING VALLEY RAILWAY
COMPANY TO THE PETITION OF THE UNITED
STATES ENTITLED "PETITION FOR THE
SALE OF THE CAPITAL STOCK AND BONDS
OF CERTAIN COAL COMPANIES, OWNED BY
THE HOCKING VALLEY RAILWAY COMPANY,
AND THE TOLEDO & OHIO CENTRAL RAIL-
WAY COMPANY."**

[Filed October 23, 1915.]

The Hocking Valley Railway Company in pursuance of the order of the Court requiring it to answer said petition, without waiving its objection to the jurisdiction of the Court to entertain such petition or to make such order, for answer thereto says:

Long prior to the filing of the bill of complaint herein, it acquired 2,500 shares of stock of The Buckeye Coal & Railway Company, 2,006 shares of stock of The Ohio Land & Railway Company, and, 2,000 shares of the capital stock of The Boston Coal & Wharf Company. All said stocks (except 5 shares each of said Buckeye and Ohio Land Companies) were thereafter duly pledged by it with Central Trust Company of New York, Trustee under its First Consolidated Mortgage, dated March 1, 1899. Thereafter this defendant conveyed all of its equity in all said stocks of The Buckeye Coal & Railway Company and The Ohio Land & Railway Company to Central Trust Company of New York in trust for the purposes mentioned in the Trust Agreement dated April 30, 1908, being Exhibit "E" to the bill of complaint herein. This defendant, subject to said pledge, still owns said Boston Coal Dock & Wharf stock.

Without conceding the jurisdiction of this Court to require it so to do, this defendant has co-operated in efforts, by the parties beneficially interested therein, to procure the release of said stocks from this defendant's First Consolidated Mortgage and the disposition thereof pursuant to the provisions of said Trust Agreement of April 30, 1908, all as fully appears in the records of this Court in this cause, and it is the desire and purpose of this defendant to continue such efforts.

Said Boston Coal Dock & Wharf Company is not engaged in the coal mining business and does not own or have any interest in any coal lands. It owns certain real estate and certain dock property located at or near Duluth, in the State of Minnesota. It owns no other property and is exclusively engaged in operating said dock as a public dock under a tariff filed with the Interstate Commerce Commission. None of its property is owned, leased, or controlled in any manner by the Sunday Creek Company.

This defendant, prior to the commencement of this suit, offered in good faith for value \$218,000 First Mortgage Five Per Cent. Bonds of Kanawha & Hocking Coal and Coke Company. It has heretofore sold all of said bonds except \$190,000, face value, and is endeavoring to dispose of the remainder and will do so as soon as they can be sold at a fair value. They are part of an issue of bonds of which, as this defendant is informed and believes, \$2,842,000 are now outstanding. The Kanawha & Hocking Coal & Coke Company is in default in the payment of interest upon said bonds due July 1, 1915, and in the payment of the sinking fund under the mortgage securing same.

It owns no stock of the Raybould Coal Company. Said Company, having transferred all of its property and assets to the Sunday Creek Coal Company, thereafter, on or before May 31, 1902, was duly dissolved and a certificate of such dissolution duly filed with the Secretary of State of the State of Ohio, under the laws of which State it was organized and incorporated.

This defendant does not own any coal properties in which the Sunday Creek Company (now the Sunday Creek Coal Company) is interested.

This defendant submits that the matters presented by

said petition are adjudicated by the final decree entered herein on March 14, 1914; that none of them falls within the final clause of said decree and that the Court is without jurisdiction to entertain said petition.

This defendant prays that said petition be dismissed as against it.

Respectfull submitted,
The Hocking Valley Railway Company,
By J. A. Stewart Mackie, Treasurer.
Lawrence Maxwell,
Solicitor.

ANSWER OF THE CENTRAL UNION TRUST COMPANY.

[Filed October 22, 1915.]

The defendant Central Trust Company of New York, as Trustee under the first consolidated mortgage made by The Hocking Valley Railway Company and as Trustee under a certain agreement dated April 30, 1908, between it and The Hocking Valley Railway Company, for answer to the petition of the United States of America for sale of the capital stock and bonds of certain coal companies owned by The Hocking Valley Railway Company and The Toledo & Ohio Central Railway Company, filed October 9, 1915, respectfully shows and alleges as follows:

First: It denies that the defendant The Hocking Valley Railway Company (hereinafter for brevity called the Hocking Valley Company) owns two thousand four hundred ninety-five (2,495) shares, of the par value of one hundred dollars (\$100) each, of the capital stock of The Buckeye Coal & Railway Company (hereinafter for brevity called the Buckeye Company), and alleges that title to said two thousand four hundred ninety-five (2,495) shares of stock of Buckeye Company is as hereinafter set forth.

It denies that defendant Hocking Valley Company owns one thousand nine hundred ninety-nine (1,999) shares of The Ohio Land & Railway Company (hereinafter for brevity called Ohio Company) or two thousand (2,000) shares of The Boston Coal Dock & Wharf Company and two thousand (2,000) shares of stock of Wharf Company), and alleges that title to said one thousand nine

hundred ninety-nine (1,999) shares of stock of Ohio Company and two thousand (2,000) shares of stock of Wharf Company is as hereinafter set forth.

It has no knowledge or information sufficient to form a belief as to the ownership by Hocking Valley Company of any shares of stock of The Raybould Coal Company.

It alleges that two thousand four hundred ninety-five (2,495) shares of stock of Buckeye Company and two thousand one (2,001) [not one thousand nine hundred ninety-nine (1,999)] shares of stock of Ohio Company and two thousand (2,000) shares of stock of Wharf Company, each of the par value of one hundred dollars (\$100) per share, are pledged with it as Trustee of the first consolidated mortgage of Hocking Valley Company dated March 1, 1899, and certificates therefor stand in its name as Trustee; it further alleges that all right, title and interest of Hocking Valley Company in and to the equity of said shares (except the share of the Wharf Company), subject to their pledge as aforesaid, was sold, assigned and transferred to it as Trustee under a certain agreement bearing date April 30, 1908, by and between Hocking Valley Company and Central Trust Company of New York upon the trusts therein set forth; that copies of said agreement have been heretofore filed in this cause and this answering defendant respectfully refers to the copies of said agreement for the terms and conditions thereof.

It has no knowledge in respect to the alleged ownership by Hocking Valley Company of bonds of The Kanawha & Hocking Coal & Coke Company or by The Toledo & Ohio Central Railway Company of stock of The Imperial Coal Company or The National Coal Company and leaves the petitioner to make such proof in respect thereto as it may be advised.

It begs to refer to the decree herein dated March 14, 1914, in order to determine the correctness of the citation therefrom set forth in the petition, and likewise prays the production of the decision of this Honorable Court, dated July 30, 1915, for the purpose of determining whether the holding of the court therein is correctly set forth in such petition.

It is informed and believes that Wharf Company, The Raybould Coal Company and The Kanawha & Hocking

Coal & Coke Company are mentioned in the decision of this Honorable Court dated December 28, 1912, but it alleges the facts in regard to the alleged control thereof by Hocking Valley Company do not appear in said opinion, and prays the production thereof to this court.

Second: Further answering said petition, this defendant alleges that in the opinion of this court, dated July 30, 1915, the following appears at page 2:

"We cannot too often repeat that the prime purpose of our decree was to insure complete separation of the railroad interests from the coal mining interests, so that the former should not and could not dominate the latter."

It is informed and believes that Wharf Company is not engaged in the coal mining business, nor does it own nor has it any interest in any coal lands, but that it conducts an open dock at Duluth, Minnesota, and that said company has filed its tariffs for the use of said dock with the Interstate Commerce Commission and that its property is not used exclusively by any one shipper or any particular set of shippers, but is open generally to the public; that it is advised and believes that the business of the Wharf company is such that stock does not fall within either the letter or spirit of the decree hereinbefore entered herein.

Third: Further answering said petition, this defendant alleges that heretofore and under date of March 1, 1899, Hocking Valley Company decided to issue its first consolidated bonds not to exceed the sum of twenty million dollars (\$20,000,000) and to secure the same by a mortgage or deed of trust upon property then owned by it and formerly belonging to The Columbus Hocking Valley & Toledo Railway Company, together with certain securities then owned by it. In order to secure the bonds so authorized, Hocking Valley Company made, executed and delivered, under date of March 1, 1899, its first consolidated mortgage, by which it conveyed to this answering defendant as Trustee the property formerly belonging to The Columbus, Hocking Valley & Toledo Railway Company; also one million two hundred thousand dollars (\$1,200,000) first mortgage bonds of Ohio Company; two thousand four hundred ninety-five (2,495) shares of the capital stock of Buckeye Company of the par value of one hundred dollars (\$100) each, and two thousand five hun-

dred fifty (2,550) shares of the capital stock of The Wellston & Jackson Belt Railway Company of the par value of one hundred dollars (\$100) each, upon the trusts set forth in said mortgage.

In order to further secure said bonds, Buckeye Company joined in said mortgage and conveyed to this answering defendant as Trustee certain property therein described consisting of upwards of ten thousand (10,000) acres of land and stated to be all the lands and real estate formerly held or owned by The Hocking Coal & Railroad Company in the counties of Hocking, Perry and Athens, in the State of Ohio.

Subsequent to the execution and delivery of the mortgage aforesaid the following securities were pledged with this answering defendant as Trustee as further security for the bonds issued and outstanding and secured thereby: Thirty-two thousand three hundred sixty-three (32,363) shares of the capital stock of Sunday Creek Company of the par value of one hundred dollars (\$100) each (which said shares have heretofore been duly released and are now no longer in the possession of this answering defendant); one hundred (100) shares of the capital stock of Sunday Creek Coal Company, a corporation organized and existing under the laws of the State of Ohio, of the par value of one hundred dollars (\$100) each (being the balance remaining after the exchange of all other shares of said Company previously pledged with this defendant for a like amount of stock of the Sunday Creek Company); thirty-six thousand dollars (\$36,000) face value of The Columbus & Toledo Railway Company seven per cent. bonds, first series; twenty-one thousand dollars (\$21,000) face value of The Columbus & Toledo Railway Company seven per cent. bonds, second series; two thousand one (2,001) shares of the capital stock of The Ohio Land & Railway Company of the par value of one hundred dollars (\$100) each; three hundred thousand dollars (\$300,000) face value of The Wellston & Jackson Belt Railway Company six per cent. bonds; two thousand (2,000) shares of The Boston Coal Dock & Wharf Company of the par value of one hundred dollars (\$100) each, and two hundred seventy-five thousand dollars (\$275,000) face value of The Ohio Land & Railway Company first mortgage bonds.

That this answering defendant now holds but one million three hundred thirty-seven thousand dollars (\$1,337,000) face value of the bonds of the Ohio Company out of one million four hundred seventy-five thousand dollars (\$1,475,000) pledged as aforesaid, the balance of said bonds having been paid off and canceled.

That of the twenty million dollars (\$20,000,000) of bonds authorized by said first consolidated mortgage this answering defendant has authenticated and delivered sixteen million one hundred fifty-six thousand (\$16,156,000) face value, of which one hundred thirty thousand dollars (\$130,000) have been retired by operation of a sinking fund provided for in said mortgage. It alleges, upon information and belief, the balance of said bonds so authenticated and delivered are in the hands of a large number of persons, firms and corporations, the names and addresses of many of which are unknown to this answering defendant, as bona fide holder for value; that such persons, firms and corporations are in no way connected with the management nor have they any control over Hocking Valley Company or its various subsidiaries mentioned in the bill of complaint in this action and the amended and supplemental bill of complaint, and have no part of voice in the management of said companies or in the conduct of their policies. It is informed and believes that such bonds were purchased and acquired by the holders thereof in reliance upon the terms and provisions of the mortgage and the pledge to it as Trustee of the various securities mentioned in said mortgage and those which were thereafter acquired in consideration of the authentication of bonds pursuant to the provisions of said mortgage and otherwise. This answering defendant is informed and believes that the holders of said bonds were entitled and had a right to rely upon the terms of said mortgage and the pledge of the securities hereinbefore mentioned as Trustee not of the pledgor Hocking Valley Company, but of the owners and holders of the sixteen million twenty-six thousand dollars (\$16,026,000) face value of bonds authenticated and outstanding under said mortgage, which holders are numerous and are in no way connected with the management and control of Hocking Valley Company or its subsidiaries, as this defendant is informed and believes.

Fourth: Further answering said petition, this answering defendant alleges that a certain agreement was executed and delivered to it as Trustee under date of April 30, 1908, by Hocking Valley Company by which said company sold and transferred to it in trust all its right, title and interest in thirty-two-thousand three hundred seventy-five (32,375) shares of the capital stock of the Sunday Creek Company, in one hundred (100) shares of the capital stock of The Sunday Creek Coal Company, a corporation of the State of Ohio, in twenty-five hundred (2,500) shares of the capital stock of Buckeye Company, and in two thousand six (2,006) shares of the capital stock of Ohio Company; that it believes Exhibit E attached to the bill of complaint is a true copy of said agreement and it refers to the same for the purpose of determining the trust upon which said securities were delivered to it, but prays the production of the original agreement upon the trial of this cause in order that its terms may be fully and properly before this court.

It alleges that it is advised that under the provisions of said agreement the securities therein set forth are held by it as Trustee for the persons, firms or corporations as shall be stockholders of record of the Hocking Valley Company at the times provided for in any distribution of the proceeds of the securities transferred by said agreement and that Hocking Valley Company has now no interest whatsoever in said securities.

This defendant further alleges that it is informed and verily believes that the stock of the Hocking Valley Company, other than that owned by The Chesapeake & Ohio Railway Company, consists of more than twenty thousand (20,000) shares, the holders of which are not parties to this action and are numerous and widely scattered, and few of them, if any, are in any way identified with the management of the properties of that corporation or its subsidiaries, and that such management is entirely independent of said stockholders, and the only voice they have in the management and control of the properties of the Hocking Valley Company or its subsidiaries or of the various coal companies heretofore controlled by it is the right to annually elect directors of the Hocking Valley Company, which right they have been unable to exercise since 1909 by reason of certain injunctions obtained to

proceedings pending in the State Courts of Ohio. That this answering defendant is advised that such stocks so pledged with it under said agreement dated April 30, 1908, are held by it as Trustee for the holders of the stock of the Hocking Valley Company under the trust set forth in such agreement, and that as to the holders of over twenty thousand (20,000) shares of said stock who are parties to this action and who have no voice or control in the management of said Hocking Valley Company or its subsidiaries, a sale thereof cannot be made except in accordance with the terms of said trust deed dated April 30, 1908.

Fifth: That heretofore and after a full hearing in which the holdings of this answering defendant as above set forth of the securities of the Ohio Company, the Buckeye Company and the Wharf Company were fully disclosed, a decree was entered in this action dated March 14, 1914, which said decree directed in Clause 1 of Section II thereof the sale of the interests of the defendant railway companies in stock of the Sunday Creek Company and that such sale be made free and clear from every interest or claim of John A. Doyle and Central Trust Company of New York under certain agreements dated April 30, 1908, and of the Central Trust Company of New York as Trustee under the consolidated mortgage of the Hocking Valley Company, but made no mention of nor gave no direction in respect to a sale of any of the other securities pledged with this answering defendant as Trustee of the consolidated mortgage of the Hocking Valley Company and included in the agreement of April 30, 1908, heretofore mentioned, though as set forth above, the facts in respect to such holdings by this answering defendant are fully disclosed in its answer and in the proofs taken prior to the making and entry of said decree.

In and by such decree the defendant railway companies were perpetually enjoined from "directly or indirectly owning, holding or acquiring any stock of said Sunday Creek Company or in any of the companies hereinbefore named the property of which is owned, leased or controlled by said Sunday Creek Company, intending hereby to impose an absolute prohibition against said railway companies or any of them owning or controlling any share of stock in said Sunday Creek Com-

pany or otherwise owning or controlling, directly or indirectly, any interest in any of the coal properties in which the company is interested."

By the last clause of said decree it was further provided:

"That jurisdiction of this cause be retained by this court for the purpose of making such other and further orders and decrees as may be necessary to the due execution of this decree and the complete dissolution of the combination and monopoly herein condemned."

That said decree was a final decree, and the time in which the same can be modified, amended or enlarged has fully expired, yet the present application is to compel, in the action in which such decree was entered, a sale of securities the sale of which was not ordered thereby, and this answering defendant is advised and believes that the petition is not one falling within the final clause of the decree above quoted, and that the court is without jurisdiction to entertain said petition.

Wherefore, this defendant having fully answered, prays that the petition be dismissed as against it, with its reasonable costs and charges.

Joline, Larkin & Rathbone,

Vorys, Sater, Seymour & Pease,

Solicitors for Defendant Central Trust Company of New York as Trustee.

Arthur H. Van Brunt,

Augustus T. Seymour,

Of Counsel.

ORDER.

[Filed May 19, 1916.]

(1) July 26, 1915, the Hocking Valley Company and the Chesapeake & Ohio Railway Company, defendants herein, filed a report that they were about to enter into a contract, subject to the approval of this court, for the sale of 2500 shares of the capital stock of the Buckeye Coal & Railway Company, and 2006 shares of the capital stock of the Ohio Land & Railway Company (being the entire issued capital stock of each coal company); that the proposed contract of sale provided for the exchange of \$1,337,000, face value, of the twenty-year purchase money bonds of the Ohio Land & Railway

Company, bearing interest at 6% per annum and maturing January 1, 1914, for \$700,000, face value, of income mortgage bonds of a corporation to be organized and to be designated the Hocking Coal Lands Company.

After hearing all parties concerned upon a motion to confirm such proposed sale, the motion was denied for reasons stated in an opinion of July 30, 1915, disapproving of the contract unless certain stated modifications were made of some of its provisions; these modifications have not been made, and such stock and bonds remain unsold or otherwise disposed of. The certificates representing these stocks, except such as were necessary to qualify directors of the respective companies, were placed in the name of the Central Trust Company of New York, as trustee, and such certificates together with the bonds before mentioned are held in pledge by such trust company as additional security for payment of the bonds issued under the first consolidated (\$20,000,000) mortgage of March 1, 1899 (in evidence in this suit), given by the Hocking Valley and the Buckeye Coal & Railway Company to such trust company as trustee; and the stock mentioned subject to the lien stated, are also held by such trust company under the provisions of the trust agreement of April 30, 1908, and shown in Exhibit E, to the original bill herein.

Since the entry of the decree herein of March 14, 1914, it has been shown that after the date of the court's opinion and prior to that of the decree, the Hocking Valley and the Chesapeake & Ohio Railway companies determined to take appropriate action, under the consolidated mortgage and the trust agreement before mentioned, "to effect the sale under said instruments of all interests in coal properties covered thereby, including stock of the Sunday Creek Company and the stock of companies the property of which was owned, leased or controlled by said Sunday Creek Company." And on April 16, 1914, action was taken by the parties interested, including Central Trust Company of New York, as trustee, whereby the value of the Buckeye stock was fixed at not more than \$18 a share, and the value of the Ohio stock at nothing, although the Hocking Valley by resolution of March 18, 1915, requested Central Trust Company of New York, as trustee, "to

cause an appraisal to be made of the value of the first mortgage bonds of the Ohio Land & Railway Company pledged under said first consolidated mortgage," such appraisal did not appear to have been made when approval of this court was first sought of the sale of the capital stock of the Buckeye and Ohio companies and the bonds of the latter under the proposed contract before pointed out, yet, as will appear later herein, the Trust Company has in fact caused appraisal to be made of the lands securing such bonds.

(2) October 9, 1915, the United States filed herein a petition seeking to enforce sale of the respective interests of the Hocking Valley and the Toledo & Ohio Central in the capital stock of coal companies and certain bonds held in one of the companies, as follows:

(a) As to the Hocking Valley: 2485 shares in the Buckeye Coal Company and 1999 shares of the Ohio Land Company—all comprised within the stocks above referred to, though the bonds of the latter company are omitted; the entire issue of capital stock in the Boston Coal, Dock & Wharf Co., 2000 shares, and in the Raybould Coal Co., 358 shares; and \$190,000 par value of the bonds issued by the Kanawha & Hocking Coal & Coke Co., a defendant herein.

(b) As to the Toledo & Ohio Central: All the capital stock, \$300,000 face value, in the Imperial Coal Company, and \$160,000, face value, in the National Coal Company.

(3) October 23, 1915, the Hocking Valley and the Toledo & Ohio Central each filed answer to the foregoing petition, and on October 22, 1915, the Central Trust Company of New York, as trustee under the Hocking Valley first consolidated mortgage and as trustee under the agreement of April 30, 1908, filed answer to such petition; but analysis of the petition and these answers, and the unsatisfactory character of the evidence which has been offered under these pleadings in the form of stipulations and an affidavit of Charles W. Adams (valid objection, we think, being made to the introduction of the latter), satisfy us that further consideration of the subjects of the petition (except as to the stocks of the Buckeye and the Ohio companies and

also the bonds of the latter company) should be postponed as stated in the order below.

However, it appears in such answer of Central Trust Company and is without denial: that 2495 shares of stock in the Buckeye Company and 2601 (not 1999) shares in the Ohio Company are held in pledge by the Central Trust Company as trustee under the Hocking first consolidated mortgage, and certificates therefor stand in its name as trustee; that all rights, title and interest of the Hocking Valley in and to the equity of such shares, subject to their pledge, as stated, were sold, assigned and transferred to such trustee as trustee under the agreement of April 30, 1908; that it now holds, among other securities not needing present mention, \$1,337,000 face value of the first mortgage bonds of the Ohio Company in pledge under the Hocking Valley first consolidated mortgage; that of the \$20,000,000 bonds authorized by that mortgage, it has authenticated and delivered \$16,156,000 face value, of which \$130,000 have been retired by operation of the sinking fund provided for in the mortgage.

(4) On the date the Government filed its last petition, October 9, 1915, an affidavit of Carl Remington was introduced without obligation, which in the following respect, is not disputed: That Remington has been secretary of the Chesapeake & Ohio and the Hocking Valley since April 1, 1913, and prior thereto was assistant to the chairman of the board of both companies; that after adoption of the resolution of the Hocking Valley, before referred to, in respect to appraisement of the Ohio Company's bonds, "an appraisal was accordingly made by Mr. Tracy W. Guthrie, appointing (appointed) for that purpose by the trustee, which fixed the value of the properties of the Ohio Company securing said bonds at \$561,500;" and that certain changes had been proposed by the parties concerned respecting the modifications above referred to as having been stated in our opinion of July 30, 1915, disapproving the contract reported the 26th of that month, which proposed changes appear in an exhibit to such affidavit. Thereafter, October 15, 1915, an order of the court was entered, disapproving the proposed contract in its modified as well as in its original form.

(5) It now appears that the mortgage bonds in question of the Ohio Land & Railway Company matured January 1, 1914, more than two months prior to the entering of the decree herein of March 14, 1914. One of the principal objections to approval of the proposed contract of sale of such bonds and the accompanying stocks, was that the plan of the contract would expose a substantial portion of the property—to wit, that covered by the mortgage of the Ohio Land Company—held under lease by the defendant Sunday Creek Company (now Sunday Creek Coal Company), to foreclosure and sale, and this condition remains, and, regardless of their merits, differences have arisen between the Buckeye and the Ohio Land companies, on the one hand, and the Sunday Creek Coal Company, on the other; these conditions satisfy the court that such interests as the Hocking Valley and the Chesapeake & Ohio (as the holder of the majority interest in the capital stock of the Hocking Valley) have in the stock of the Buckeye and the Ohio companies, as also in the bonds of the latter company, substantially interfere with and obstruct the execution and operation of the decree of March 14, 1914.

Wherefore, in view of such decree and the findings made in connection therewith, including the orders of injunction contained in the decree, concerning the combination there found and declared to exist, which included that of the railroad and coal interests, and in pursuance of the jurisdiction then retained “for the purpose of making such other and further orders and decrees as may be necessary to the due execution of this decree and the complete dissolution of the combination and monopoly herein condemned”,² it is adjudged and ordered, as follows:

² We cannot assent to the claims of counsel that the jurisdiction so retained has been exhausted. We are not called upon to determine whether the decree was final in the sense that an appeal would lie to the Supreme Court. Applications made in that behalf, it is true, were approved. We are convinced, however, that the jurisdiction thus retained continues and will continue until the combination and monopoly condemned by the decree have been completely dissolved, so far, at least as concerns the matters here under consideration. True, also, it was supposed at the time the decree was entered, that the sale of the stock in the Sunday Creek Company would so far as the union of coal and railroad interests was concerned, effectually break up the combination so offending against the acts of Congress. But since this could not be known with certainty, the

(a) The equity and interests of the Hocking Valley Company and the Chesapeake & Ohio Railway Company in and to the certain capital stock, to wit, 2500 shares in the Buckeye Coal & Railway Company, 2006 shares in the Ohio Land & Railway Company and \$1,377,000 face value of the first mortgage bonds of the latter company, shall be disposed of by absolute sale; and the Central Trust Company of New York, as trustee under the first consolidated mortgage of the Hocking Valley, and as trustee under the contract of April 30, 1908, shall, upon the conditions hereinbelow stated, release all claim as trustee and as pledgee of such shares of stock and such bonds, and of each of them, upon receipt or tender of the proceeds derived from the sale or sales of such stocks and bonds respectively, provided, that in every instance such proceeds of sale shall be received

retained jurisdiction was couched in language that would seem to be distinctly appropriate to the present conditions. The jurisdiction retained was for the purpose of making not only such further orders and decrees as might be necessary to the due execution of the decree, but also to the complete dissolution of the combination and monopoly therein condemned. It certainly cannot be successfully denied that jurisdiction of such a case as this may and ought to be retained until the decree is fully and effectively enforced, and the condemned monopoly and combination completely dissolved. And as respects the power to retain jurisdiction, see *Wabash Railroad v. Adelbert College*, 208 U. S. 38, 52 to 57. The practice is general in such cases as this to retain jurisdiction in one form or other until the offending conditions can be fully ascertained and removed. *Standard Oil Co. v. United States*, 221 U. S. at p. 82; *United States vs. American Tobacco Co.*, 4 Fed. Anti-Trust Dec. 246, 251; *United States v. Eastman Kodak Co.*, 225 Fed. (D. C.) 61, 81; *United States v. Reading Co.*, 226 Fed. (D. C., three judges sitting) 229, 286; *United States v. United States Steel Corporation*, 223 Fed. (D. C., four judges sitting) at pp. 161, 178-9; and in *United States v. Union Pacific R. R. Co., et al.*, Pamph. 19, 20 (D. C., three judges sitting) it was provided in the last section of the decree:

"and jurisdiction is retained for the purpose of giving full effect to this decree and the decree herein entered on February 12, 1913, and for the purpose of making such other and further orders and decrees or taking such other action, if any, as may become necessary or appropriate to carry out and enforce said decrees and the directions of the Supreme Court."

Absence of power so to retain jurisdiction, or failure fairly to interpret the power reserved, would entitle the offending parties either to immunity under the doctrine of *res adjudicata* or subject them to new and distinct litigation for continuing or repeating offenses denounced in the original suit; the former cannot be the true intention, and the latter could serve no useful purpose differing from that sought to be accomplished under the jurisdiction retained.

and applied by such trustee under and according to the provisions of Article Seven of the first consolidated mortgage of the Hocking Valley to such trust company, bearing date March 1, 1899 (Vol. V. Tit. Exhibits, at p. 98). Should the Central Trust Company fail seasonably or refuse to release such stocks or bonds, or both, by proper delivery of the certificates representing the stocks or of the bonds mentioned, then and in any such event sale or sales will be made under appropriate orders of the court. The sales and releases of stocks and bonds thus provided for shall be made free from every interest or claim of each of such railway companies and their respective stockholders and also of the Central Trust Company in both of its capacities as trustee.³

For the purpose of enabling said railway companies and said trustee to comply with this order respecting the sale and release of such stocks and bonds, they shall have three months from the entry hereof so to comply herewith; and if said railway companies and said trustee are able to dispose of such stocks and bonds as

³ We cannot think the insistence of the Central Trust Company well founded that it is not amenable to judicial process or order requiring the company to exercise its powers to cause release to be made of the stocks and bonds in question under conditions such as those above stated, for it seems to be conceded that it is vested with power so to act on the pledgor's request, and whatever discretion it may have in such instances is certainly not one of an unreasonable or arbitrary character. And as regards its rights and duties under the trust agreement of April 30, 1908—the one made in view of the commodities clause of the Hepburn Act—whereby the Hocking Valley in terms sold and assigned to such trust company all the Railway Company's interest in the stocks now in question in trust for certain specified purposes (subject, however, to the lien of the first consolidated mortgage, and the trust company's rights as pledgee and trustee thereunder), among which was, in the event of the Supreme Court holding such clause to be constitutional, that the trustee should dispose of the equity in the coal stock "when and as directed in writing by the persons, firm or corporations holding and owning of record a majority in amount of stock of the Hocking Valley," etc. (see Exhibit E to Bill of Complaint herein), we are convinced that this provision is opposed to the ruling in *United States v. Union Pacific R. R. Co.*, 226 U. S. 470, 475; our conclusion in this respect derives support from the fact that the Chesapeake & Ohio Railway Company holds and controls a majority of the stock in the Hocking Valley, and so even according to the terms of the instrument is in a position to dominate the Buckeye and Ohio Land companies. *United States v. Del. Lack & West. R. R.*, 238 U. S. 516, 535-6.

We regard as clear the power of the court to compel the bonds and stocks to be sold free from the lien of the consolidated mortgage,

herein directed, they shall be and hereby are authorized and empowered so to do, but before concluding such sale, said companies shall report to this court the manner of their compliance with this order, the name of the proposed purchaser, bringing him into court for examination, and the said sale and all proceedings looking to compliance with this order, shall be subject to approval, rejection or modification by the court.

If within said period said companies do not so comply with this order, then the court will (unless for good cause shown it shall grant further time) otherwise provide for the sale of such stocks and bonds by such action as may be deemed necessary and adequate to such purpose, either through appointment of a master to make such sale or of a receiver to take possession of such stocks and bonds, with the power to sell and dispose of the

substituting therefor in the hands of the mortgage trustee the proceeds of such sale. One who takes a mortgage upon several items of property of such character that their common ownership or operation may offend against the anti-trust law or the commodities clause, and such that the mortgage serves practically to aid in tying them together, must be deemed to hold his mortgage subject to the contingency that if the complete and final separation of one item of the mortgaged property from the remainder becomes essential to the due enforcement of either named law, the court charged with such enforcement may take control of that item, free it from the consolidating tendency of the mortgage, and substitute therefor its judicially ascertained equivalent. Otherwise the mortgage will stand as the ready means of restoring—or at least tending to restore—those conditions which the court is endeavoring to destroy. It may well be true that a railroad and a coal company under common ownership and management, are worth more as security under a mortgage than when independent, and that their effective separation does impair the mortgage security, but this cannot make the law helpless.

If the power exists to direct a sale free from lien, the conditions here found make appropriate the exercise of that power. The consolidated mortgage was given by a railroad and a coal company; it challenged attention to those features which carried potential violation of laws already passed or which might be passed; and the values of these pledged stocks and bonds, having nothing except lands to give them value, can be determined with such substantial accuracy that there is little danger of a mistake seriously prejudicial to the mortgagee. We would have no confidence that a sale of the mere equity of the Hocking in these stocks and bonds would bring more than temporary independence. The purchaser could not free them from the overwhelming mortgage nor compel its foreclosure, but the danger of foreclosure and the consequent wiping out of this equity would be constant. The influence, if not the practical domination, of the railroad mortgagor, upon whom the purchaser must rely to prevent foreclosure, could not be escaped.

same, or in such other manner as will enforce compliance with this order; provided, however, that if said railway companies and said trustee should conclude to dispose of such stocks and bonds under the contract in that behalf, which was heretofore presented to the court as above stated, with the modifications thereof which were set out in an opinion of this court of July 30, 1915, whether the proposed purchaser be the same as the person then offered, or some other person or some company satisfactory to the court, such plan will be received and such action thereon taken as shall seem to the court fit and proper, but if such a course as this be adopted it shall not be treated as extending time above stated for effecting the sale as ordered.

(b) In view of the state of the evidence respecting the sale of stocks and bonds mentioned in the last petition of the United States, other than the particular stocks and bonds above ordered to be sold, and of the absence of any showing of immediate necessity to pass upon the questions so involved, further consideration of those matters will be postponed; but any of the parties concerned shall have the right to take further evidence within a reasonable time and again to present the subjects, not herein distinctly passed upon, for the consideration and decision of the court.

Approved for entry, May 19, 1916.

J. W. Warrington,

L. E. Knappen,

A. C. Denison,

Circuit Judges.

PETITION AND MOTION OF THE HOCKING VALLEY AND CHESAPEAKE AND OHIO RAILWAY COMPANIES.

[Filed October 5, 1916.]

The Hocking Valley Railway Company and The Chesapeake and Ohio Railway Company, defendants herein, respectfully show to the court:

1. On May 19, 1916, this court entered its order herein directing the sale by said defendant of 2500 shares of the capital stock of the Buckeye Coal & Railway Company, being all of the capital stock thereof, and 2006 shares of

the capital stock of the Ohio Land & Railway Company, being all the outstanding stock thereof, and \$1,312,000 face amount of the twenty-year purchase money gold bonds of said last mentioned company, which matured January 1, 1914, being all of the issued and outstanding bonds of said company. Said order directed the sale of said stock and bonds free from the lien thereon of the first consolidated mortgage of The Hocking Valley Railway Company to Central Trust Company of New York, trustee, and directed said trustee to release the same for the purpose of effecting said sale. Said Trust Company has appealed from said order and said appeal is now pending. The Hocking Valley Railway Company and The Chesapeake and Ohio Railway Company declined to join in said appeal.

2. Said order required that said stocks and bonds be sold within three months from the date of said order. Prior to the expiration of the period of three months the defendant Railway Companies negotiated with one John S. Jones for the sale to him, upon the terms hereinafter mentioned, of all said stocks and bonds. As this court had adjourned for the summer, it was impossible to report the details and terms of said sale until the present time.

3. The terms of said sale are set forth in a contract between said defendant Railway Companies and said John S. Jones, which contract will be submitted to the court upon the hearing hereof. Said contract provides, among other things, that said defendant railway companies will make due application to Central Trust Company of New York, as trustee under said first consolidated mortgage of The Hocking Valley Railway Company, for the release of said stocks and bonds therefrom and defendant Railway Companies believe that if due application is made to said Trust Company for the release of said stocks and bonds in accordance with the provisions of said mortgage said Trust Company, in the event of the approval of said contract and upon the finding by this court that the price fixed in said contract is the fair and reasonable value of said stocks and bonds and that no better price can be obtained therefor, will be willing to release said stocks and bonds from the lien of said mortgage and will dismiss said appeal.

4. The value of said stock of the Buckeye Coal & Railway Company has been fixed by appraisalment of Tracy W. Guthrie at the sum of \$18.00 per share, or \$45,000.00 in all, and a sum in excess of said appraised value is realized by the terms of said sale. The value of the properties of the Ohio Land & Railway Company, which constitute the sole value of the bonds of that company, was heretofore appraised by said Guthrie at the sum of \$561,500.00 as heretofore shown to this court. Defendant Railway Companies are advised that said appraisalment was based upon the actual value of the coal lands and properties of said Ohio Company free and clear from any encumbrances or leases and was based upon the amount which might be realized from the sale or disposal of said properties in parcels and extending over a considerable time. Said Guthrie has since advised said Trust Company that an appraisal, if based upon the value of said properties if sold in one parcel, would be much less than his original appraisal in view of the fact that the value under these circumstances would be confined to those tracts of land under which the coal is of full thickness and good quality and the value under such circumstances he appraises at \$379,500.00. The latter value represents the fair value of said property as security for the bonds of the Ohio Land & Railway Company by reason of the fact that only a sale of the last mentioned character could be made by the Trustee under the mortgage securing said bonds if said mortgage were to be foreclosed, and defendants are advised that a price equal to or slightly in excess of said last mentioned sum, as in the price provided by the contract above referred to, is the best price that can be obtained for said bonds if the directions of this court in the order of May 19, 1916, are to be carried out. The value of the Ohio Company's property is less than the face value of its bonds and its stock is therefore only of nominal, if any, value.

5. Said defendants upon the hearing of this petition will produce said purchaser for examination by this court and, after such examination and such other examination or inquiry as this court may deem it proper to make, these defendants will move the court for an order approving of said John S. Jones as purchaser and of

said contract for the sale of said shares of stock and of said bonds, and for the approval of the terms of said contract as sufficiently protecting the interests in said stocks and bonds of Central Trust Company of New York, as Trustee.

Due notice of said motion has been given to counsel for each of the parties to this suit and to E. M. Poston.

Lawrence Maxwell,

A. C. Rearick,

Attorneys for Defendants, The Chesapeake and Ohio Railway Company, The Hocking Valley Railway Company.

ORDER.

[Filed November 10, 1916.]

The appeal of Central Trust Company of New York, Trustee, from the decree entered herein on May 19, 1916, having been dismissed by the Supreme Court of the United States as appears by its mandate dated November 9, 1916, filed herein, it is now ordered that the order approved for entry on October 7, 1916, upon the dismissal of said appeal of Central Trust Company of New York, Trustee, be entered upon the journal of this court.

Approved for entry November 10, 1916.

J. W. Warrington,

L. E. Knappen,

A. C. Denison,

Circuit Judges.

ORDER—Entered November 10, 1916.

On this day came The Hocking Valley Railway Company and The Chesapeake and Ohio Railway Company, defendants herein, and presented to the court their petition reporting the sale of certain stocks of the Buckeye Coal & Railway Company and the Ohio Land & Railway Company and certain bonds of said last mentioned company, pursuant to the order of this court entered May 19, 1916, and tendered for examination John S. Jones, the purchaser of said stocks and bonds, and the defendant, Central Trust Company, having duly filed its answer to said petition, and it appearing to the court that due notice of said petition and motion had been given to all

the parties herein and had also been given to E. M. Poston, and after hearing counsel for said petitioners in support of said petition and motion, together with the oral testimony of witnesses taken before it, the court, being fully advised in the premises, finds that said purchaser is satisfactory to the court and that said sale complies with the order entered herein on May 19, 1916, and that the terms of the contract of sale are, and the amount of cash paid for said securities is, such as to fully protect the interests of Central Trust Company of New York, Trustee, and that the price proposed to be paid for said properties is the reasonable value thereof.

It is ordered that said sale and the terms thereof as embodied in the contract now submitted to this court be and the same hereby are approved, and that said Central Trust Company, Trustee, upon due application to it in accordance with the terms of the first consolidated mortgage of the Hocking Valley Railway Company as provided in said contract, release said stocks and bonds from the lien of said mortgage upon the payment to it of the purchase price thereof.

Approved for entry upon the dismissal of the appeal of the Central Trust Company from the order of May 19, 1916.

October 7, 1916.

J. W. Warrington,
Circuit Judge.

L. E. Knappen,
Circuit Judge.

A. C. Denison,
Circuit Judge.

ORDER—Filed March 25, 1924.

For good cause shown, it is hereby ordered that the time of the return of the citation and the time of the appellants, The Buckeye Coal & Railway Company and The Sunday Creek Coal Company, within which to prepare and transmit to the Supreme Court of the United States a certified transcript of the record herein, and to docket their said appeal in said court is hereby extended to May 1, 1924.

Dated March 5, 1924.

(Signed) Loyal E. Knappen,
U. S. Circuit Judge.

AMENDED CERTIFICATE OR STATEMENT OF EVIDENCE.

[Filed April 7, 1924.]

Be it remembered that, upon the hearing of the petition of The Buckeye Coal and Railway Company and The Sunday Creek Coal Company of Ohio herein on the 6th day of December, 1921, and upon the further hearing of said petition and also of the supplemental petition of plaintiff filed herein on the 21st day of November, 1922, which latter hearing was had before Knappen and Denison, Circuit Judges, and Cochran, District Judge, on June 8, 1923, the following evidence was introduced:

1. The opinions of this court in this cause, filed December 28, (Dec. 30) 1912, and appearing of record herein.
2. The decree of this court entered herein on March 14, 1914, and appearing of record herein.
3. The opinion of this court on the petition of The Hocking Valley Railway Company to approve the sale of certain stocks and bonds, filed herein July 30, 1915, and appearing of record herein.
4. The petition of the United States of America, plaintiff, filed herein October 9, 1915, asking, among other things, that The Hocking Valley Railway Company and the Central Union Trust Company be required to sell the capital stocks and bonds of certain coal companies, including the stock of The Buckeye Coal and Railway Company, and appearing of record herein.
5. The answer of The Hocking Valley Railway Company to said petition filed herein on the 23rd day of October, 1915, and appearing of record herein.
6. The answer of the Central Union Trust Company of New York to said petition, filed herein on the 22nd day of October, 1915, and appearing of record herein.
7. The order of this court, entered on May 19, 1916, upon said last mentioned petition, ordering the sale of the stock of The Buckeye Coal and Railway Company, etc., and appearing of record herein.
8. The petition and report of The Hocking Valley Railway Company et al., filed herein on the 5th day of October, 1916, reporting the sale of said The Buck-

eye Coal and Railway Company stock to John S. Jones, and appearing of record herein.

9. The order of this court, entered November 10, 1916, ordering the entry approved October 7, 1916, to be entered on the journal and appearing of record herein.

10. The order of this court, approved October 7, 1916, and entered November 10, 1916, approving and confirming the sale of said stock to said Jones, and appearing of record herein.

11. The four exhibits attached to the reply of The Buckeye Coal and Railway Company and The Sunday Creek Coal Company to the answers of The Hocking Valley Railway Company and the Central Union Trust Company to said petition of The Buckeye Coal and Railway Company and The Sunday Creek Coal Company, filed herein on December 6, 1921, as said exhibits appear of record herein.

12. The First Consolidated Mortgage of The Hocking Valley Railway Company and The Buckeye Coal and Railway Company to Central Trust Company of New York, Trustee, dated March 1, 1899, from which it appears that under date of March 1, 1899, The Hocking Valley Railway Company authorized an issue of \$20,000,000, face value, of its first consolidated mortgage 4½% gold bonds maturing July 1, 1999, and to secure such issue of bonds said railway company made, executed and delivered said mortgage, dated March 1, 1899, to Central Trust Company of New York, as Trustee, in and by which said mortgage it granted and conveyed unto such trustee certain real and personal property therein described as security for bonds to be issued thereunder; and that in order further to secure said bonds of the railway company, The Buckeye Coal and Railway Company joined in the execution of said mortgage, and duly delivered the same, but did not sign the bonds, and among other things granted and conveyed to such trustee certain real property which had formerly been the property of The Hocking Coal and Railroad Company; that various covenants were made by the grantors in said first consolidated mortgage, and among other such covenants said mortgage contains the following in article 2 thereof, The Hocking Valley

Railway Company being therein referred to as the Railway Company, The Buckeye Coal and Railway Company as the Coal Company, and the Central Trust Company as the Trustee:

Section 9 of Article Two thereof is as follows:

(a) "Sec. 9. On July 1st, 1900, and on or before July 1st, in each and every year thereafter, the Coal Company shall deliver to the Trustee a statement in writing showing the amount of coal mined from lands owned by the Coal Company, and mortgaged hereunder, during the year ending with the 1st day of March next preceding the date of such statement, and simultaneously it shall pay to the Trustee hereunder a sum equal to two cents per ton on all coal so mined during such next preceding year."

"All sums so received by the Trustee shall by it be used and applied in purchasing bonds hereby secured, in such manner as to it shall deem best, and at such prices as it shall deem best, not exceeding the rate of one hundred and five per centum and accrued interest. All such bonds when so purchased shall be canceled. All sums so received by the Trustee and not by it so used within six months from its receipt thereof, shall be returned to the Coal Company."

It is recited in said mortgage as follows:

(b) "The Buckeye Coal and Railway Company, the party of the second part hereto, did acquire all of its real estate, lands and tenements hereinafter described and conveyed, by and under a deed thereof made and delivered the twenty-fifth day of February, 1899, whereby and whereunder said The Buckeye Coal and Railway Company was required, and did agree, in consideration of such transfer to join in this mortgage and to grant and convey the said real estate, lands and tenements to the Trustee, upon the terms and conditions of this mortgage, for the further security of the said bonds issued and to be issued hereunder by the Railway Company."

(c) It is further recited in said mortgage as follows:

"At a meeting of the holders of all of the capital stock of the Coal Company, duly called and held at its office at Columbus, Ohio, on the twenty-fifth day of February, 1899, resolutions were duly adopted by the

affirmative vote of the holders of all of the capital stock of the Coal Company, consenting to and approving of the execution of an indenture substantially in the form of these presents, as additional security for the bonds of the Railway Company hereby secured, for an aggregate principal sum not exceeding \$20,000,000."

(d) It is further recited in said mortgage as follows:

"The Board of Directors of the Coal Company, at a meeting thereof duly held the twenty-fifth day of February, 1899, duly adopted resolutions in the following words, that is to say:

"Resolved, that the President and Secretary of the Company be, and hereby they are authorized and directed, in its behalf and under the corporate seal, to execute and to deliver to Central Trust Company of New York as trustee, a mortgage or deed of trust to be known as the First Consolidated Mortgage, substantially of the tenor of the draft thereof now submitted at this meeting, upon all of the real estate, lands and tenements of this Company heretofore acquired by this Company from Melville E. Ingalls, Jr., and George H. Gardiner, upon the express condition, and in consideration of the agreement of this Company to grant and convey the said real estate, lands and tenements to Central Trust Company of New York, as Trustee, upon the terms and conditions set forth in the said mortgage, and as additional security for bonds issued and to be issued thereunder for an aggregate principal sum not exceeding twenty million dollars (\$20,000,000), such mortgages to be executed and to be delivered jointly by this Company and The Hocking Valley Railway Company."

(e) It is further recited in said mortgage as follows:

"This indenture is substantially of the tenor of the draft thereof submitted to and approved by the stockholders of the Railway Company and also by the stockholders of the Coal Company at their said meetings, and submitted to and approved by the board of directors of the Railway Company and also by the board of directors of the Coal Company at their said meetings."

(f) It is further recited in said mortgage as follows:

"And the Coal Company, the party of the second

part, in consideration of the premises, and of the purchase and acceptance of such bonds by the holders thereof, and of the sum of one dollar to it by the trustee duly paid, at or before the ensembling and delivery of these presents, the receipt whereof is hereby acknowledged, has executed and delivered these presents, and has granted, bargained, sold, aliened, remised, released, conveyed, confirmed, assigned, transferred and set over, and by these presents does grant, bargain, sell, alien, remise, release, convey, confirm, assign, transfer and set over unto the Trustee, the party of the third part, its successors and assigns forever:

All and singular the real estate, lands and tenements formerly of The Hocking Coal and Railway Company," and so forth, describing the lands in question.

(g) Sections 1 and 2 of Article Ten of said mortgage are as follows:

"Section 1. All the covenants, stipulations, promises and agreements in this indenture contained, by or in behalf of the Railway Company or of the Coal Company, severally and respectively, shall bind such Company, its successors and assigns, whether so expressed or not.

Sec. 2. Nothing contained in this indenture or in any bond hereby secured, shall prevent any consolidation, or merger of the Railway Company or of the Coal Company with each other or with any other corporation or any conveyance and transfer, subject to the continuing lien of this Indenture and to all the provisions hereof, of all the mortgage and pledged premises as an entirety to a railroad corporation at that time existing under and by virtue of the laws of any state or states, and entitled to acquire the same; provided, however, that such consolidation, merger or sale shall not impair the lien and security of this indenture, or any of the rights or powers of the Trustee, or of the bondholders hereunder, and that upon such consolidation, merger or sale, the due and punctual payment of the principal and interest of all of the said bonds according to their tenor, and the due and punctual performance and observance of all the covenants and conditions of this indenture, shall be assumed by the cor-

poration formed by such consolidation or merger, or purchasing as aforesaid."

13. Said mortgage further provided, in Article One thereof, that all bonds to be secured thereby, from time to time, should be executed, and should be delivered by said Railway Company to said Trustee for certification, and thereupon, as provided in said article, the Trustee should certify and deliver the same; and that only such bonds as should bear thereon such certificate should be secured by said indenture or entitled to any lien or benefit thereunder; and that every such certificate of said trustee, upon any bond executed in behalf of said Railway Company, should be conclusive evidence that the bond so certified was duly issued under the said mortgage, and is entitled to the benefit thereof.

It is also recited in said consolidated mortgage that The Hocking Valley Railway Company is a successor in title to The Columbus, Hocking Valley and Toledo Railway Company, having acquired its said property from Ingalls and Gardiner who purchased the same at the foreclosure sale which is mentioned in paragraph 18 of the statement of evidence.

14. Subsequently to the execution and delivery of said mortgage or deed of trust as aforesaid, and prior to the filing of the bill in this suit, the Central Trust Company as such trustee, did in conformity with the terms of said mortgage duly certify \$16,156,000, face value, of bonds executed and delivered by and in behalf of said Railway Company, in conformity with the terms of said mortgage, payable to bearer and intended for general circulation, and thereupon each and all of said bonds so certified were duly delivered pursuant to the terms of said mortgage, and all of said bonds were duly issued; and of said bonds so issued \$16,022,000, face value, are now outstanding in the hands of numerous holders for value.

Said mortgage was filed for record and recorded in each of the counties wherein real and personal property therein described was and is situated, as alleged in the said answer of The Hocking Valley Railway Company to said petition of The Buckeye Coal and Railway Com-

pany and The Sunday Creek Coal Company filed December 6, 1921.

15. General Mortgage of The Hocking Valley Railway Company to the Equitable Trust Company of New York, Trustee, dated January 1, 1919, given to secure bonds authorized to be issued thereunder not exceeding \$50,000,000 at any one time outstanding and further limited so that the aggregate principal amount of bonds at any one time outstanding under said indenture together with the aggregate principal amount of bonds or other indebtedness then outstanding and secured by mortgage or other lien prior thereto upon the lines of railroad or any part thereof of the Railway Company then subject to said mortgage (exclusive of the principal amount of such bonds taken up by the Railway Company and pledged under said indenture or any such prior indenture) shall not exceed three times the aggregate par amount of the then issued and outstanding preferred and common stock of the Railway Company, other than preferred and common stock issued after the date of the execution and delivery of said general mortgage in any other manner than at par for cash or property actually received by the Railway Company after that date or in conversion of any convertible bonds issued thereunder, such bonds to be issuable in series, to mature at such date or dates and to bear interest at such rate or rates, not exceeding seven per cent. per annum, payable semi-annually on the first day of July and the first day of January in each year, as the Board of Directors or the Executive Committee of the Railway Company may from time to time determine and as shall be stated in said bonds respectively.

It is provided in the granting clause of said General Mortgage that the same is subject to the prior lien of the First Consolidated Mortgage of The Hocking Valley Railway Company and The Buckeye Coal and Railway Company dated March 1, 1899, made to Central Trust Company of New York, Trustee, and other liens there specified. It is provided by article 2 of said General Mortgage that:

"Sec. 2. \$19,864,000, face amount, of the bonds shall be reserved to be signed and sealed from time to time by the Railway Company and, subject to the provisions

of Section 5 of this Article Two, authenticated and delivered by the Trustee to the Railway Company, or on its order, for the purpose of refunding, paying or purchasing, or otherwise acquiring, at, before, or after the maturity thereof, or of reimbursing the Railway Company for expenditures made for such purpose, all in the manner and subject to the restrictions hereinafter stated, a like face amount of the following described bonds (hereinafter sometimes called collectively the underlying bonds) secured by the following described mortgages constituting liens on some or all of the lines of railroad embraced in this indenture, prior to the lien of this indenture:

* * * * *

III. \$16,022,000 First Consolidated Mortgage $4\frac{1}{2}\%$ Gold Bonds of the Railway Company, maturing July 1, 1999, issued under and secured by the First Consolidated Mortgage of the Railway Company and the Buckeye Coal and Railway Company, dated March 1, 1899, made to Central Trust Company of New York, as Trustee.

(a) Subject to the provisions of Section 5 of this Article Two, whenever the Railway Company shall tender or cause to be tendered to the Trustee, in bearer form or accompanied by proper instrument of assignment or transfer, and whether at, before or after the maturity thereof, any of the underlying bonds, with all coupons, if any, thereunto belonging and unmatured at the time of such tender, (or cash to the amount of any such coupons not so delivered) the Trustee shall, in exchange therefor, authenticate and deliver to the Railway Company, or on its order, bonds to a face amount equal to the face amount of such underlying bonds so received by the Trustee.

(b) Subject to the provisions of Section 5 of this Article Two, at any time or times at or after the maturity of any class of the underlying bonds, or within twelve months before such maturity, the Railway Company may sell bonds in order to provide the means to pay or to purchase all or any part of so many of such class of the underlying bonds as shall not theretofore have been delivered to the Trustee and be held by the Trustee under this indenture and which have matured,

or may be about to mature, within such twelve months. The Trustee shall authenticate and deliver to the Railway Company or upon its order, bonds in such face amount as shall be requested by the Railway Company, not greater than the aggregate face amount of such underlying bonds so maturing, provided that an amount of money equal to the face amount of the bonds so authenticated and delivered, together with the amount of interest accrued or to accrue on such underlying bonds to the date of maturity, shall simultaneously be deposited with the Trustee in exchange therefor. Out of the money so received by the Trustee, it shall, on demand of the Railway Company, and upon delivery to the Trustee, from time to time, in bearer form or accompanied by proper instruments of assignment and transfer of any of such underlying bonds so paid or purchased, pay to the Railway Company, or on its order, a sum equal to the face amount of the underlying bonds so paid or purchased, together with the amount of such interest, if any, thereon."

Section 5 of Article 2, so referred to, requires that the railway company furnish to the Trustee certain certificates and opinion of counsel whenever it requests the authentication and delivery of bonds. None of said reserved bonds have been issued. But about \$11,800,000 face value of the bonds secured by said mortgage have been pledged to secure notes and obligations of The Hocking Valley Railway Company.

16. Appellee offered in evidence the opinion of Lurton, Circuit Judge, dated April 25, 1898, in the case of Central Trust Company vs. Columbus, Hocking Valley and Toledo Railway Company, et al., in the Circuit Court of the United States for the Southern District of Ohio, reported in 87 Federal Reporter, commencing on page 815, which is as follows:

"Central Trust Co., of New York,
vs.

Columbus, H. V. & T. Ry. Co. et al.

"Lurton, Circuit Judge. This is a consolidated cause, in which are united two suits to foreclose mortgages made by the Columbus, Hocking Valley & Toledo Railway Company and the Hocking Coal & Railway Company. They will be referred to in this opinion as the "Railway

Company" and the "Coal & Railroad Company." The original foreclosure suit was filed by the Central Trust Company of New York, to foreclose a consolidated 5 per cent. mortgage of the two companies made to it as trustee, dated October 1, 1881. That mortgage was made to secure bonds to the aggregate amount of \$14,500,000 of which \$8,000,000 only were issued, the remainder being reserved in accordance with provisions contained in the mortgage, to take up outstanding divisional bonds; the Railway Company being the result of the consolidation of two or more companies. The suit was based upon defaults in the payment of interest. Prior to the filing of this foreclosure bill by the Central Trust Company, it had filed a bill in this court, based upon an unsecured claim; and upon its application a receiver had been appointed, and possession taken of all the property of the Railway Company. The Central Trust Company's foreclosure bill was therefore filed in the same court. The defendants to the original bill are the two mortgagors, the Knickerbocker Trust Company and the Guaranty Trust Company, trustees under subsequent mortgages. A decree pro confesso was entered against the two mortgagors. To this bill of the Central Trust Company, the Knickerbocker Trust Company and the Guaranty Trust Company have filed answers. Their interests are as follows: (1) The Knickerbocker Trust Company is trustee, substituted in the place of John H. Devereux, under a mortgage dated Aug. 1, 1884, made by the Railway Company and the Coal & Railroad Company, and known as the "Joint Mortgage," securing 6 per cent. bonds issued by the two companies, to the amount of \$2,000,000. Default was made June 1, 1897, in the payment of the interest on these bonds. (2) The Guaranty Trust Company of New York is trustee under the general lien mortgage of the Railway Company, dated October 1, 1896, securing 4 per cent. bonds, of which \$2,133,000 are outstanding, together with \$18,290.93 scrip. Default was made July 1, 1897, in payment of interest thereon. The issue raised by the answers of the Knickerbocker Trust Company and the Guaranty Trust Company is, in substance, as follows: Whether or not the consolidated mortgage, so far as it relates to the lands of the Coal & Railroad Company, is valid, and constitutes a lien prior to

the lien of the Knickerbocker Trust Company's mortgage; the Knickerbocker Trust Company asserting that the execution by the Coal & Railroad Company of the consolidated mortgage was ultra vires, and that the only valid mortgage affecting the Coal & Railroad Company's lands is the mortgage to the Knickerbocker Trust Company, securing bonds executed by both the Railway Company and the Coal and Railroad Company. Before the hearing upon the issues presented in the foreclosure bill of the Central Trust Company, the Knickerbocker Trust Company, as trustee of the joint mortgage, filed its original bill in this court to foreclose that mortgage. In this bill the parties defendant are the two mortgagors, the Central Trust Company, the Guaranty Trust Company, and the Ohio Land & Railway Company.

By this bill the Knickerbocker Trust Company affirmatively attacks the validity of the consolidated mortgage so far as it embraces the property of the Coal & Railroad Company. The Ohio Land & Railway Company was made defendant because of a certain lease made by it to the Coal & Railroad Company, dated March 19, 1894, under which it is alleged that the last-mentioned company pledged certain royalties from its coal lands by way of security for performance of its obligations under the lease. The Guaranty Trust Company was made defendant as a junior mortgagee, and answered, assailing the joint mortgage as invalid in respect to the Coal & Railroad Company's lands, and asserting the priority of the claim of the Ohio Land & Railway Company. The two causes were consolidated by order of the court, made upon stipulation; and, by the same order, the Central Trust Company was allowed to file an amendment to its bill, joining the Ohio Land & Railway Company as defendant. Such amendment was duly filed, and the Ohio Land & Railway Company answered. The bonds secured by the consolidated mortgage of October 1, 1881, to the Central Trust Company, are the bonds of the Railway Company only. The mortgage includes the property of both the Railway Company and the Coal & Railroad Company, the latter joining therein for the purpose of conveying its property to secure the bonds of the Railway Company. The validity of the bonds is not questioned. Neither is the validity of the mortgage challenged so far

as the property of the Railway Company is concerned. Neither is the validity of the mortgage by the Coal & Railroad Company challenged by that company or any of its stockholders. The Knickerbocker Trust Company and the Guaranty Trust Company, as subsequent mortgagees of the Coal & Railroad Company, with constructive notice of the consolidated mortgage, deny the validity of that mortgage so far as it includes property of the Coal & Railroad Company. The bonds issued under the consolidated mortgage are, so far as this record shows, in the hands of bona fide purchasers, with no other notice of the purposes for which the Coal & Railroad Company joined in the mortgage than such as appear in the recitals of the bonds and upon the face of the mortgage securing them. The question of ultra vires is that upon which the decision must turn.

The Hocking Coal & Railroad Company was incorporated September 17, 1881, under the provisions of Rev. St. Ohio, §3225 et seq. Its authorized capital stock was \$3,000,000. Section 3235 is as follows:

"Corporations may be formed in the manner provided in this chapter for any purposes for which individuals may lawfully associate themselves, except for dealing in real estate or carrying on professional business; and if the organization is private it must have a capital stock."

Section 3866 of the Revised Statutes provides:

"Companies organized for the purpose of mining, quarrying or manufacturing, may, when such purpose is stated, in the articles of incorporation, construct a railroad with a single or double track, with such side-tracks, turn-outs, offices and depots as they may deem necessary to carry out the objects of the incorporation, from any mine, quarry, or manufactory to any other railroad, or any canal, slack water navigation, or other navigable water or place within or upon the borders of this state, and shall in respect to such railroad be subject to and governed by the provisions of chapter 2."

The articles of incorporation of the Hocking Coal & Railroad Company contain the following provision:

"Said corporation is formed and organized for the purpose of mining coal and iron ore, and transporting the same to market; also, for manufacturing ores and iron, and carrying on such incidental business as is usual

in such cases. Said corporation shall also possess all the powers conferred by statute to own, build, and construct railroads, to acquire and hold stock in railroads, and all powers to own, acquire, or hold transportation, railroad, or stock shares or bonds conferred in any case upon coal or other mining companies in this state. Said corporation shall also have the power to build a railroad from its mines to any other railroad. It is understood that this company will acquire lands and carry on its mining and manufacturing chiefly in the counties of Hocking, Perry, Athens, and Vinton, in that state of Ohio, but that it shall not be confined in its mining, manufacturing, or building, or owning of railroads to said counties."

On September 19, 1881, the incorporators met, and received subscriptions to the amount of \$1,500,000 of stock, which, by the record of that company, appears to have been paid in. Directors and officers were elected September 30, 1881. At a meeting of the directors held on same day, propositions for the sale to the company of coal lands to the extent of 10,000 acres were received and accepted, for which \$1,500,000 were to be paid in cash within 60 days. On the same day a resolution in the following terms was adopted:

"Resolved, that this company, for the purpose of enabling the Columbus, Hocking Valley and Toledo Railway Company to sell and negotiate its consolidated bonds to the amount of \$14,500,000, and at the request of said Railway Company, and in view of the additional benefits to be derived by this company from the increased facilities to be afforded by said Railway Company in the transportation of its coal and iron ore and otherwise, and in consideration of the sum of \$1,000 this day paid by said Railway Company to this company, hereby consents and agrees to become a party to the mortgage to be executed to said Railway Company to secure said bonds, and hereby authorizes its president and secretary to unite in said mortgage to be executed by said Railroad Company to secure said \$14,500,000 of bonds, and to secure the payment of said bonds and interest, upon all the lands, real estate, and property of this company, being 10,000 acres and over of coal and mineral lands held by this company in fee simple in the counties of Hocking,

Perry and Athens, in the state of Ohio, and which are to be particularly described in said mortgage.

“Resolved, that the president and board of directors, having examined the resolutions passed by said Railway Company in respect to the execution of said mortgage, and the terms and conditions upon which it is to be executed, and having seen and examined said mortgage as the same has been prepared for execution, are content and satisfied with the terms and conditions of said mortgage, and assent to the same, and authorize the president and the secretary of this company to execute said mortgage with said Railway Company for the purposes therein expressed, and to embrace in said mortgage all the lands held and owned by this company as aforesaid, and to make said mortgage and bonds a first lien upon the said lands.”

This resolution was also submitted on the same day to a meeting of the stockholders, and unanimously adopted.

The mortgage referred to in these resolutions is the mortgage designated as the “consolidated mortgage,” and was duly executed and delivered October 1, 1881. That mortgage, among other things, recites that:

“Whereas, the said Hocking Coal & Railroad Company is the owner of ten thousand acres of coal lands and real estate, situated in the counties of Hocking, Perry, and Athens, aforesaid, and whereas, said Coal and Railroad Company is desirous that the said Columbus, Hocking Valley & Toledo Railway Company should execute this mortgage, and make the loan provided for therein, and for that purpose the said Hocking Coal and Railroad Company, by the unanimous vote of its directors and stockholders, being desirous of enabling said railway company to make the loan herein provided for, and to receive the benefit to its property which will come by the greater facilities thus afforded to it in the transportation of its coal and iron ores hereafter to be mined, and its iron hereafter to be manufactured, enters into this mortgage, and secures the payment of the bonds hereinafter mentioned, and interest thereon upon its real estate hereinafter described.

In the subsequent parts of this mortgage, the resolution of the directors and stockholders authorizing its execution is set out in full. At the date of this mortgage, the

Railway Company appears to have been the sole stockholder in the Coal & Railroad Company. Thus, on September 30, 1881, the persons who had subscribed for the stock of the Coal & Railroad Company acquired their stock by an instrument in these words:

"Cleveland, Ohio, September 30, 1881.

"We, the undersigned, hereby sell, assign, and transfer to M. M. Greene, president and trustee of the Columbus, Hocking Valley & Toledo Railway Company, all of our stock now held or owned by us, and each of us, in the Hocking Coal & Railroad Company; and we hereby authorize said Hocking Coal & Railroad Company to transfer said stock on its books to said M. M. Greene, president and trustee, and to issue to him a certificate therefor.

"Continental Coal Company,

"By Wm. J. McKinnie, President.

"W. J. McKinnie,

"Wm. B. Sanders,

"Charles G. Hickox,

"H. Fenninger,

"J. J. Purcell."

The only certificate for stock which ever appears to have been issued was in these words:

"Certificate No. 1, issued to M. M. Green, President-Trustee, Columbus, Hocking Valley & Toledo Railway Company, of Columbus, Ohio, 15,000 shares, September 30, A. D. 1881."

Whether the Coal & Railroad Company was ever paid by the subscribers for its stock, or whether the subscribers were ever paid by the Railway Company for their stock, does not satisfactorily appear on this record. The fact is unimportant upon the issues here to be tried. That the Railway Company controlled and voted this stock, both when this mortgage was authorized and when it was executed and delivered, does sufficiently appear on the minutes of the Railway Company, which have the appearance of a record made to subserve some undisclosed purpose. Thus, on November 2, 1881, there appears a resolution in these words:

"Resolved, that the president of this company is hereby directed to hand over to Stevenson Burke six

million four hundred thousand dollars (\$6,400,000) of the consolidated mortgage bonds of this company."

Below, and originally a part of this entry, there appears the following words: "To apply to the purchase of the stock of the Hocking Coal & Railroad Company,"—which words now appear to have been erased. No explanation of this is offered.

On August 14, 1882, the same minutes show the following action:

"Resolved, that the president be, and is hereby, directed to purchase the whole of the stock of the Hocking Coal & Railroad Company, which covers and represents ten thousand acres of coal lands in Hocking, Perry and Athens counties, amounting to fifteen thousand shares at and for the price of eight million dollars, payable in the consolidated bonds of this company, dated September 1st, 1881, at their par value; that the title to such stock be taken in the name of the president, as trustee for this company.

"Thereupon, during the meeting, the president reported that he had purchased said fifteen thousand shares of the capital stock of said Hocking Coal & Railroad Company, at and for the price of eight million dollars, and paid therefor, in the bonds of this company, at the price above mentioned. And thereupon, on motion, it was resolved, that the purchase of said Hocking Coal & Railroad Company's stock, as aforesaid, be, and the same is hereby, ratified, approved and confirmed."

The relation of the Coal & Railroad Company and the Railway Company to each other, as shown by this stock transaction, and by the three mortgages here involved, most clearly indicates that the former was a mere auxiliary of the latter; and, although they must be regarded as legally distinct corporations, they were equitably and substantially but one. This fact, though not determinative as to the power of the Coal & Railroad Company to mortgage its property to secure a debt of the Railway Company, is still of some significance when we come to consider whether its mortgage is to be regarded as a mere security for the debt of the Railway Company. That the Coal & Railroad Company had the power to make a mortgage to secure its own debts is not disputed. Neither is it contended for the complainant that one

corporation, in the absence of express or implied authority in its constituting law, has the power to appropriate its capital for the benefit of another, or in a business not authorized by its charter. The general doctrine is well settled that a mining or manufacturing corporation cannot lend its credit nor employ its resources for any purpose or objects not fairly within the business it is authorized to conduct. *Pearce v. Railroad Co.*, 21 How. 441; *Green Bay & M. R. Co. v. Union Steamboat Co.*, 107 U. S. 98, 2 Sup. Ct. 221; *Humbolt Mining Co. v. Variety Iron Works Co.*, 22 U. S. App. 334, 10 C. C. A. 415, and 62 Fed. 356; *Vault Co. v. Boynton*, 37 U. S. App. 602, 19 C. C. A. 118, and 71 Fed. 797. But it is equally clear that a business corporation may exercise all the powers within the fair and reasonable intent of the law under which it is organized, and, in doing so, may exercise a choice of means reasonably adapted to the end authorized, unless it is clearly and explicitly limited to a particular method defined by its charter. The validity of the mortgage to the Central Trust Company is not challenged by the corporation which made it, nor by any stockholder. The latter unanimously consented to its execution, and, if a mortgage for the purposes indicated upon the face of this conveyance could be validly made at all, the corporation is undoubtedly bound. The question as to its validity is made only by two subsequent mortgagees, who accepted their respective securities with full notice of the existence of this prior incumbrance. Unless, therefore, the instrument is absolutely void, as wholly beyond the power of the corporation, it must be regarded as a valid security.

The Coal & Railroad Company was not formed for the purpose of mining coal alone. Its articles of association stated that its purposes were much wider, and included the mining of iron ore and its manufacture into iron, and the transportation of all its products to market. In addition, the purpose to construct a railroad and to own stock in railroads or other transportation companies was also asserted. We must look to the statutes of Ohio to see how far these various purposes might be combined in one corporation, and what powers are conferred upon such a company. This corporation was organized under the general incorporation law of Ohio, and its powers

are therein defined. Section 3235, Rev. St. Ohio, provides that corporations may be organized for any purpose "for which individuals may lawfully associate themselves"; and Section 3866 gives power to any mining company, when such purpose is stated in the articles of association, to construct a railroad from its mines to any other railroad, or to navigable water within or upon the border of the state, if such railroad shall be deemed necessary to carry out the objects of the incorporation. The articles of association, showing the purpose of this company to engage in both mining and manufacturing, and to construct a railroad in aid of that business, have already been set out. By Section 3862 and 3863, power is given such mining and manufacturing companies "to purchase or subscribe for, in the name of the company, such an amount of the stocks of any railroad, or other transportation company, as they deem necessary, in order to procure proper facilities for transportation for the manufactories, mines, or other works of the company." These are the provisions of the general law under which this Coal & Railway Company was organized which have any direct bearing upon the issues here to be decided.

The object of the Railway Company is issuing its bonds, and in making a mortgage upon its property, stated in the face of the mortgage itself, was—First, to apply the \$6,500,000 in exchange for prior divisional bonds; second, to apply the proceeds arising from the sale of the remaining bonds in double-tracking, equipping, and improving its railway, and in the purchase of such property as the interests of the company should require. The bonds issued for these latter purposes are the only bonds actually issued, and aggregate \$8,000,000. The inducement moving the Coal & Railroad Company to join in the mortgage stated on the face of the mortgage was that:

"Said Coal and Railroad Company is desirous that the said Columbus, Hocking Valley & Toledo Company should execute this mortgage, and make the loan provided for therein; and for that purpose the said Hocking Coal & Railroad Company, by the unanimous vote of its directors and stockholders, being desirous of enabling said Railway Company to make the loan herein provided for,

and to receive the benefit to its property which will come by the greater facilities thus afforded to it in the transportation of its coal and iron ores hereafter to be mined, and its iron hereafter to be manufactured, enters into this mortgage, and secures the payment of the bond hereinafter mentioned, and interest thereon, upon its real estate hereinafter described."

The Coal & Railroad Company owned mineral lands in several counties, which lands were contiguous to the existing line of the Railway Company. That Railroad extended from navigable water on the southern border of the state, at Pomeroy.

It was just such a railroad as the coal and railroad company was authorized to construct by the provisions of Section 3866 of the Ohio Revised Statutes. If the facilities of the existing railway were not such as to serve the necessities of this mining company, but could be made so by double-tracking, branches, switches, depots, or greater special equipments, I see no reason why it might not have purchased or subscribed to the stock of the railway company, if, by so doing, it could procure the transportation facilities it needed. The power to do this is found in Section 3863, Rev. St., which provides that:

"The directors of any such (mining) company may authorize its president to purchase or subscribe for, in the name of the company, such an amount of the stocks or any railroad or other transportation company, as they deem necessary, in order to procure proper facilities for transportation for the manufactories, mines, or other works of the company."

The power existed to obtain needed transportation by either building a railroad for itself or by subscribing to the stock of a railroad company. It exercised this power, not by construction, nor by subscribing to the stock of a railway company, but by mortgaging its property to secure the bonds to be issued by a railway company to obtain means to double-track and otherwise enlarge its facilities as a transportation company serving the Coal & Railroad Company. That this was the purpose of this mortgage appears from the resolution of the stockholders of the coal and railroad company set out on the face of the mortgage. The mortgagees are entitled to stand

upon this record declaration of the purposes of the mortgagor. They had no other information or source of information, and could not be presumed to know that an ulterior purpose (if any there was) was to be subverted, not authorized by the mortgagor company. A purchaser of one of the bonds secured under this mortgage would undoubtedly be charged with notice of the general powers of the coal and railroad company, and would be required to take notice of all that appeared upon the face of the bond and of the mortgage under which it was secured. If he turned to the mortgage, he would find the railway company had issued the bonds to "enable it to borrow money found necessary to be used in building and double-tracking its road, paying for property purchased and to be purchased, improvements made and to be made, and for the equipment of its said line of railroad, providing terminal facilities, constructing docks, building bridges, and otherwise extending and enlarging its capacity for the transportation of freight and passengers, and for other general purposes of said railway." He would find also that the coal and railroad company extended the mortgage to its property for the purpose of enabling said railway company to make the loan provided for, and to receive the benefits "to be derived by this company from the increased facilities to be afforded by the said railway company in the transportation of its coal and iron ores," etc. The fair inference to be drawn from these recitals of the instrument is that the relation of the coal and railroad company was not that of a mere accommodation security or guarantor, but was that it had, in effect, guaranteed the bonds of the railway company as a means of acquiring needed additional transportation facilities.

What the coal and railroad company did was this: It found an existing railway, and aided it in raising means to enlarge its transportation facilities, by guaranteeing its bonds, and thus obtained for itself needed transportation through that method, rather than by building a railway or subscribing to the stock of one. The purpose to obtain adequate transportation facilities was one clearly within the general powers of the corporation. It may be that the facilities it had in the railroad as then existing were sufficient, and that the proposed improvements were not needed, or that the mortgage was not in

good faith intended to secure such transportation facilities, or that the proceeds of the bonds so secured were intentionally misapplied. But this is no answer to innocent holders of the securities which were thus given credit and placed on the market, ostensible for an authorized purpose. *Mor. Priv. Corp.* § 609; *Railway Co. v. Hawkes*, 5 H. L. Cas. 331-371. In the case last cited was involved a contract made by a railroad company for the purchase of lands not, in fact, needed or useful for the legitimate purposes of the company, and therefore was an awful acquisition. Yet this contract was specifically enforced in favor of the vendor, who had a right to assume the purchase was for a legitimate corporate purpose. Lord St. Leonards said:

"Where the party contracting with the directors is not aware of any intended misapplication on their part, I am of opinion that the contract is binding, although it can afterwards be shown that the property really was not acquired for the railway. The safety of men in their daily contracts requires that this doctrine of *ultra vires* should be confined within narrow bounds."

To the same effect are the cases of *Mayor of Norwich v. Norfolk Ry. Co.* 4 El. & Bl. 397.

The stockholders unanimously agreed to this method of obtaining better transportation facilities. There were then no creditors to be affected. What was done injured no one having any interest, direct or indirect. The creditors now challenging the mortgage became such with full knowledge of this prior mortgage, and have no higher legal right to avoid this security than the corporation itself would have. It was not a mere accommodation security. By lending its credit, it, in effect, purchased transportation facilities as effectually as if it had subscribed for the stock of the company in order to acquire what it needed, or had in any other way used its capital in the acquisition of means of transportation. Section 3266 of the Revised Statutes of Ohio provides that "no corporation shall employ its stocks, means, assets or other property, directly or indirectly, for any other purpose whatever than to accomplish the legitimate objects of its creation." But this is nothing more than common law, and gives no added force to the well-settled rule so often stated by the courts of Ohio and all other

tribunals administering the common law. Under any fair and reasonable construction of the recitals of the objects and purposes of this mortgage, it was executed by the coal and railroad company "for no other than to accomplish the legitimate objects of its creation." The particular means adopted are not expressly prohibited; nor, under any fair and reasonable interpretation of the power conferred, can we say that the method adopted of accomplishing an authorized corporate purpose was intended to be excluded by the provisions of the Ohio law in respect to this class of companies. In accomplishing a lawful corporate purpose, a reasonable chain of means adapted to ends must be regarded as within the legislative intent, unless a contrary purpose is clearly indicated. *Mor. Priv. Corp.* § § 320-323; *City of Bridgeport v. Housatonic R. Co.*, 15 Conn. 475; *Thompson v. Railroad Co.*, 3 Sandf. Ch. 625; *Jones v. Guaranty Co.*, 101 U. S. 622; *Ellerman v. Stockyards Co.*, 49 N. J. Ep. 217, 23 Atl. 287.

The primary question here is one of construction: Was this method of accomplishing an authorized corporate purpose so far in excess of the granted powers of this corporation as that the mortgage is absolutely void, and not in the way of a subsequent mortgage by the same mortgagor to a mortgagee having constructive notice of its existence?

In *Attorney General v. Great Eastern Ry. Co.*, 5 App. Cas. 473, 478, 481, the lord chancellor, referring to *Railway Co. v. Riche*, L. R. 7 H. L. 653, said:

"It appears to me to be important that the doctrine of *ultra vires*, as it was explained in that case, should be maintained. But I agree with Lord James that this doctrine ought to be reasonably, and not unreasonably, understood and applied, and that whatever may be fairly regarded as an incident to or consequential upon those things which the legislature has authorized ought not (unless expressly prohibited) to be held, by judicial construction, to be *ultra vires*."

In the same case, Lord Blackburne said that:

"Those things which are incident to, and may reasonably and properly be done under, the main purpose, though they may not be literally within it, would not be prohibited."

In *Green Bay & M. R. Co. v. Union Steamboat Co.*, 107

U. S. 100, 2 Sup. Ct. 221, a railway company was authorized to build, construct and run, as a part of their corporate property, such number of steamboats as they may deem necessary to facilitate the business operations of the company. It made a contract guarantying that the gross earnings of each steamer of an independent steamboat company should equal a certain sum for each of two years if it would run a line in connection with the railway company. When sued upon this agreement, it relied upon the defense of ultra vires. The contract was held to be valid. In considering the question as to whether the power to construct and run a line of boats in connection with its railroad implied the power to guaranty the earnings of an independent line of boats, the court said:

"The general doctrine upon this subject is now well settled. The charter of a corporation, read in connection with the general laws applicable to it, is the measure of its powers; and a contract manifestly beyond those powers will not sustain an action against the corporation. But whatever, under the charter and other general laws reasonably construed, may fairly be regarded as incidental to the objects for which the corporation is created, is not to be taken as prohibited."

In *Marbury v. Tod*, 22 U. S. App. 267, 10 C. C. A. 393, and 62 Fed. 335, affirming *Tod v. Land Co.*, 57 Fed. 47, this court sustained a guaranty of the bonds of a railroad company by a land company, upon the ground that a power to consolidate with a railroad company implied power to induce the building of a railroad necessary to the successful working of the business of the land company by guarantying its bonds.

In *Zabriskie v. Railroad Co.*, 23 How. 381, the guaranty of the bonds of one Ohio railroad company by another Ohio railway company was sustained, under Section 3300, Rev. St. Ohio, which gave power to railway companies to aid another in the construction of its road, "by means of a subscription to the capital stock of such company or otherwise."

In *Hill v. Nisbet*, 100 Ind. 341, power to consolidate was held to imply power to purchase stock in another company with a view to consolidate.

A corporation having power to buy and improve, lease, and sell lands, was held to have power to con-

tribute to the building of a railroad by which its property was rendered accessible. *Vandall v. Dock Co.*, 40 Cal. 83. A similar corporation, with like powers, was held to have power to contribute to a college which it was proposed to establish, although not upon the company's lands. *Whetstone v. Ottawa University*, 13 Kan. 320. A company authorized to buy and hold and develop wild lands, "and to aid in the development of minerals and other materials, and to promote the clearing and settlement of the country," was held to have power to build sawmills and a hotel for the accommodation of those having business with the company. The same corporation had power to employ their capital in the construction of such railways, not exceeding twenty miles in length, as may be necessary from such mines, to intersect the Sunbury and Erie or the Allegheny Valley Railroad. The directors subscribed an amount greater than the entire authorized capital of the corporation to the stock of the Sunbury & Erie Railroad Company, under an agreement that that company would build to the lands of the subscribing company. The shareholders sought to hold the directors liable to them as for a diversion of corporate assets. The court held that, though the subscription was excessive and ultra vires the directors, yet it had been ratified by the shareholders, and the directors were therefore not liable.

In ascertaining the powers of a corporation, great regard must necessarily be paid to the character of the business which the particular company is authorized to conduct; for the general rule is that a business corporation may, in the conduct and management of its authorized business, adopt the means reasonably appropriate and usually adopted by individuals in the conduct of the same kind of business. This rule finds illustration in many of the cases, and in the case of *Ft. Worth City Co. v. Smith Bridge Co.*, 151 U. S. 294, 14 Sup. Ct. 339. There a corporation created for the purpose of dealing in lands by subdividing and selling, and having power "to enter into obligations or contracts essential to the transaction of its authorized business," obligated itself to pay to a bridge company one-third the cost of constructing a bridge over the Trinity River, whereby the property of the land company would be made acces-

sible. The bridge was to be constructed upon one of the public streets of the city of Ft. Worth, and was the property of the city. The remainder of the cost of the bridge was to be borne in equal shares by the city and the county of Tarrant. The land company, when sued by the bridge company for its contribution to the cost of the bridge, denied the validity of its contract. The court held the contract valid, saying:

"The object of the creation of the corporation was the acquisition and sale of lands on subdivision; and it cannot be successfully denied that that object would be directly promoted by the use of legitimate business methods to render the lands accessible. This involved the expenditure of money or the assumption of liability; but there is no element in this case of any unreasonable excess in that regard or of the pursuit of any abnormal and extraordinary method. The result sought was in accomplishment of the legitimate objects of the corporation and essential to the transaction of its authorized business; and the power to make the contract was fairly incidental, if not expressly granted."

Thus, while some corporations might be, from the very nature of their business, authorized to lend their credit or invest in the stocks of other corporations, yet manufacturing or mining corporations would have no authority to guaranty the contracts of another, nor to purchase shares for the purpose of controlling another nor to appropriate their assets to support the credit of another, or of an individual or firm. That an unauthorized use of corporate property was of benefit and advantage to the business of such a corporation is no justification, and will not validate a transaction if it be not within the general scope of its granted powers. This is all that was decided in the cases of *Humboldt Mining Co. v. Variety Iron Works Co.*, U. S. App. 334, 10 C. C. A. 415, and 62 Fed. 356; *Vault Co. v. Boynton*, 37 U. S. App. 602, 19 C. C. A. 118, and 71 Fed. 797; and *Valley Ry. Co. v. Lake Erie Iron Co.*, 46 Ohio St. 44, 18 N. E. 486. The case last cited involved only the question of the power of the iron company to invest its capital in the stock of a railway company. It was held that no authority existed in the iron company to subscribe to the capital stock of the railway company. The question in that case arose between the

companies themselves, under a suit based upon the contract of subscription. Here the question is made by a subsequent creditor only, and after the execution of the mortgage, and after the bonds secured thereunder had passed into circulation. The iron company had no express power to subscribe for stock in a railway company. The Coal & Railroad Company did have express power to obtain needed transportation facilities, either by building a railroad or by subscribing to or purchasing the stock of one. The iron company had no power in respect to the subject of acquiring railroad facilities. The procuring of adequate transportation facilities was a subject within the granted powers of the coal and railroad company, and the only objection which can be made to what it did is that it did not exercise its powers in the particular mode mentioned in its charter.

The case falls much more nearly under *Ehrman v. Insurance Co.*, 35 Ohio St. 324-337. There one Ohio corporation had absorbed another, and acquired real estate and other property which it was not authorized to acquire or hold under its charter. Among the assets so obtained was the note in suit. The maker of the note, when sued, denied the title of the plaintiff, upon the ground that its absorption of the corporation to whom the note was payable, and the acquisition thereby of property which it was not authorized to hold, was *ultra vires*. This defense was overruled, upon the ground that the title of the offending corporation could not be defeated by one who was a stranger to the transaction. In discussing the general subject of *ultra vires* contracts, White J., said:

"In applying the doctrine of *ultra vires* in a particular case, regard must not only be had to the unauthorized agreement or transaction, but also to the relation which the litigating parties sustain to it. Where there is an absolute and total want of power in a corporation to deal in respect to a given subject, it may be that acts done in the name of the corporation, in regard to such subject, would, as corporate acts, be void for all purposes and as against all persons. But there is an obvious distinction between such a case and one where the corporation deals with a subject within the scope of its granted powers, but for a purpose or in a mode not authorized by its charter. Thus, where property which the corporation,

under certain circumstances, is authorized by its charter to acquire, is purchased, in a mode or for a purpose not authorized, it seems clear to us that the title of the corporation to the property cannot be defeated by a party who is a stranger to the agreement by which the property was acquired, and who is not injured by the transfer."

2. It is next objected that this mortgage is void because the amount of the bonds secured exceeds the amount of the stock of the Coal & Railroad Company. The Revised Statutes of Ohio, affecting corporations of the class to which the Coal & Railroad Company belongs, provide that a corporation may borrow money not exceeding the amount of its capital stock, and issue its note or coupon and registered bonds therefor, bearing any rate of interest authorized by law, and may secure payment of the same by a mortgage of its real or personal property, or both. Rev. St. Ohio, § 3256. This limitation as to third persons must be regarded as applying to the authorized, and not the subscribed, stock. *Farmers' Loan & Trust Co. v. Toledo, A. A. & N. M. Ry. Co.*, 67 Fed. 49; *Water Co. v. De Kay*, 36 N. J. Eq. 548. The Coal & Railroad Company was not borrowing money. The Railway Company was the borrower, and its capital stock was \$20,000,000. But, assuming that if the Coal & Railroad Company could not mortgage its property to secure its own debt in excess of its capital stock, it could not mortgage it for the debt of another to any greater amount, the mortgage is not thereby rendered so absolutely void as that subsequent creditors can be heard to complain. The same question has many times been decided in favor of creditors. *New Britain Nat. Bank v. Cleveland Co.*, 91 Hun, 447, 36 N. Y. Supp, 387; *Sioux City Terminal R. & W. Co. v. Trust Co. of North America*, 27 C. C. A. 73, 82 Fed. 124; *Farmers' Loan & Trust Co. v. Toledo, A. A. & N. M. Ry. Co.*, 67 Fed. 49; *Allis v. Jones*, 45 Fed. 148; *Wood v. Waterworks Co.*, 44 Fed. 146; *Reed's Appeal*, 122 Pa. St. 565, 16 Atl. 100; *Water Co. v. De Kay*, 36 N. J. Eq. 548. *Raymond v. Railroad Co.*, 21 Wkly. Law Bul. 103, was a case arising under this same provision of the Ohio Revised Statutes, and the question was fully considered by Judge Peck, of the Superior Court of Cincinnati. The execution of the mortgage was within the general scope of the powers of the corpora-

tion, and this objection is only that it is in excess of the limitations imposed upon the exercise of that power. The statute does not declare that indebtedness in excess of capital stock shall be null and void. The corporation and every shareholder consented, and will not therefore be heard to complain. The transaction was not on its face immoral, and involved no turpitude. The objection comes from subsequent creditors, who, with knowledge that the indebtedness thus secured was in excess of the authorized capital stock, voluntarily added to that excess, and now seek to sweep out of the way prior assumption of liability that they may profit by it. Such subsequent creditors stand in the shoes of the mortgagor, and, if it could not object, they cannot. For such a violation of the limits imposed by law upon the power of the Coal & Railroad Company to create an indebtedness, the state alone should be heard to complain. The cases holding valid mortgages taken by national banks to secure loans made at the time are in point. Neither the borrower nor subsequent creditors will be heard to object. *Bank v. Matthews*, 98 U. S. 621-629; *Bank v. Whitney*, 103 U. S. 99-103; *Fritts v. Palmer*, 132 U. S. 282-292, 10 Sup. Ct. 93; *Bank v. Townsend*, 139 U. S. 67, 11 Sup. Ct. 496. The same conclusion was reached by the Court of Appeals of the Eighth Circuit in *Sioux City Terminal R. & W. Co. v. Trust Co. of North America*, 27 C. C. A. 73, 82 Fed. 124-133 et seq., the opinion being by Sanborn, circuit judge.

3. The mortgage to the Knickerbocker Trust Company is one jointly executed by the Railway Company and the Coal & Railroad Company, to secure \$2,000,000 of the joint bonds of the two corporations. The mortgage recites that the bonds are issued for the purpose of improving both properties. The only attack on this mortgage is made by the Guaranty Trust Company, which is a third mortgagee. This mortgage expressly recognizes the mortgage to the Central Trust Company and that to the Knickerbocker Company as existing prior mortgages, and is expressly subject to them. This is an estoppel, and we need not consider the objections it urges to either of said mortgages. *Bronson v. Railroad Co.*, 2 Wall. 283.

4. If any question shall arise under the answer of the Ohio Land & Railway Company as to the royalties due

from the Coal & Railroad Company, it may be presented hereafter upon the coming in of the report heretofore ordered upon that matter.

5. A decree of foreclosure will be drawn, which may be presented to me hereafter, and the terms settled, if there shall be disagreement."

17. A certified copy of the decree of foreclosure and sale entered in the said suit of Central Trust Company of New York v. The Columbus, Hocking Valley and Toledo Railway Company et al., May 24, 1898, wherein it was ordered that said consolidated mortgage made by The Columbus, Hocking Valley and Toledo Railway Company and The Hocking Coal and Railroad Company to Central Trust Company of New York dated October 1, 1881, was a valid and subsisting mortgage and lien upon the mortgaged premises, therein described, consisting of the railroads and appurtenant properties of The Columbus, Hocking Valley and Toledo Railway Company and all and singular the real property of The Hocking Coal and Railroad Company described in said decree, and from which description it appears that said real property is same real estate, lands and tenements as those described as the property of The Buckeye Coal and Railway Company included in the first consolidated mortgage of The Hocking Valley Railway Company and The Buckeye Coal and Railway Company of March 1, 1899; and it was further ordered, adjudged and decreed, that in default of payment of the sums therein found due and directed to be paid, said mortgage be foreclosed and all of said property sold by Special Master Commissioners as in said decree directed; that the railway property be first offered as a separate parcel at an up-set price of \$3,250,000, and the coal property as a separate parcel at an up-set price of \$750,000; that said properties, having first been offered separately as aforesaid, should then be offered as one parcel at an up-set price of \$4,000,000; said decree making provision for the payment of the purchase money and other things not material to this controversy.

18. The certified copy of the Special Master Commissioners' Report and Memorandum of Sale filed in the foreclosure suit above mentioned February 24, 1899, showing that the railway property of The Colum-

bus, Hocking Valley and Toledo Railway Company and the coal lands of The Hocking Coal and Railroad Company were offered for sale, pursuant to the foregoing decree of foreclosure and sale, and were sold as one parcel to Melville E. Ingalls, Jr., and George E. Gardiner for \$4,000,001.

19. A certified copy of the decree confirming the sale so reported and directing the Special Master Commissioners to execute and deliver proper deeds conveying the property so sold to said defendants.

20. A copy of the Special Master Commissioners' deed to Ingalls and Gardiner made February 24, 1899, pursuant to the proceedings in said foreclosure suit, reciting certain of said proceedings and compliance by the purchasers with the terms of sale, and conveying to said Ingalls and Gardiner the coal property sold to them as aforesaid.

21. A copy of deed from Ingalls and Gardiner to the Buckeye Coal and Railway Company which, omitting the description of property, is Exhibit 2 to the reply of said Buckeye Company et al., filed herein on March 21, 1922, and is contained in the transcript herein.

22. A document dated Columbus, Ohio, April 17, 1919, addressed to The Sunday Creek Coal Company (incorporated April, 1919), Columbus, Ohio, and signed "J. S. Jones," together with a concurrence appended thereto, signed by The Sunday Creek Coal Company and others, which is Appellees' Exhibit A-10 and the original or a copy of which is attached hereto.

23. A document dated Columbus, Ohio, April 17, 1919, addressed to The Sunday Creek Coal Company (incorporated in April, 1919), Columbus, Ohio, signed by Sunday Creek Coal Company of New Jersey, The Buckeye Coal and Railway Company and The Ohio Land and Railway Company, which is Appellees' Exhibit A-11 herein, and the original or a copy of which is attached hereto.

24. The minutes of the first meeting of the stockholders of The Sunday Creek Coal Company, of Ohio, held at Columbus, Ohio, April 17, 1919, with respect to the propositions contained in the documents mentioned in paragraphs 22 and 23 above, a copy of which is as follows, to wit:

"The Chairman then laid before the meeting the proposition from Mr. J. S. Jones, dated April 17, 1919, for the transfer to this Company of the issued capital stock and bonds of Sunday Creek Coal Company of New Jersey, The Buckeye Coal and Railway Company, and The Ohio Land and Railway Company, which was concurred in by said three companies; and a proposition under the same date from said three companies which contemplates the acquisition by this Company of the stock, bonds and properties of said three companies upon the terms and as more fully set forth in said propositions, of which the following are true copies, to wit," (here are copies of Exhibits A-10 and A-11). "Said propositions were then carefully considered, and after full discussion and consideration, on motion of Mr. Cook, seconded by Mr. Burry, the following resolution was unanimously adopted: Resolved, That the proposition this date made by J. S. Jones, and also the proposition this date made by Sunday Creek Coal Company of New Jersey, The Buckeye Coal and Railway Company, and The Ohio Land and Railway Company, this date submitted to this meeting by the chairman and thereby incorporated as a part of the record of this meeting, for the acquisition by this company of the stocks and bonds of said three companies, be, and the same are hereby, approved and accepted; Resolved, further, that in accordance with said accepted propositions the officers of this company are directed to issue to said J. S. Jones, or upon his order, all the capital stock of this company, in accordance with the terms of said two propositions, full paid and non-assessable, and that the subscriptions heretofore made to the capital stock of this company are hereby declared to be paid up and non-assessable through the acceptance of said proposition and the acquisition by this company of the stocks, bonds and properties in said propositions described; and Resolved further, that the directors and officers of this company be, and they are hereby authorized and instructed to execute all documents and papers and do every other thing necessary or proper for the carrying out of said two propositions and the consummation of the transactions contemplated by said propositions; and Resolved further, that the

transactions covered by said resolution and this acceptance thereof shall be consummated before May 1, 1919."

25. The deed from The Buckeye Coal and Railway Company to The Sunday Creek Coal Company of Ohio, dated April 30, 1919, conveying to the latter title to the premises in question. It is an ordinary warranty deed, in which the consideration stated is one dollar and other good and valuable considerations. The deed carried out the action contemplated by the resolution quoted in paragraph 24 above.

26. The minutes of the directors' meeting of The Buckeye Coal and Railway Company, held April 17, 1919, with respect to the deed mentioned in paragraph 25 above. These are, in substance, that the propositions contained in the documents mentioned in paragraphs 22 and 23 above, are set out, and thereupon the following resolution was unanimously adopted, to wit:

"Resolved, that this company approves the reorganization, merger or consolidation set forth in said two communications of April 17, 1919, to said The Sunday Creek Coal Company, one made by J. S. Jones and the other by this company and The Ohio Land and Railway Company and Sunday Creek Coal Company of New Jersey, and ratifies and approves all action taken by the officers of this company in regard thereto, and particularly ratifies and approves said proposition to which the name of this company is signed. Resolved further, that it is desirable that upon the taking effect of said reorganization as above provided, this company should cease to do business and should carry out its part of said reorganization, and as all the capital stock of this company is now owned by said new corporation of Ohio (The Sunday Creek Coal Company), the officers of this company are requested, on the request or direction of said new corporation of Ohio, to transfer and convey to said new corporation all the property of this company, real, personal and mixed, in accordance with the contract created by said two propositions of April 17th and the acceptance thereof by said new corporation, and to execute all papers and do all other things necessary to complete such transfer of this company's property."

27. A certified copy of the charter of The Sunday

Creek Coal Company of Ohio, showing that it was incorporated by John S. Jones and others April 16, 1919, with its principal place of business at Columbus, Ohio, and with an authorized capital stock of \$7,500,000.

28. A certified copy of the record of the case of The Buckeye Coal and Railway Company v. Central Union Trust Company of New York et al. from the clerk of the Court of Appeals of Perry county, Ohio, by which the following appears: On or about April 21, 1919, The Buckeye Coal and Railway Company, as plaintiff, commenced a civil action against the Central Union Trust Company of New York and The Hocking Valley Railway Company, as defendants, in the Court of Common Pleas of said county of Perry, to quiet its title to said lands. On or about November 12, 1919, The Sunday Creek Coal Company of Ohio had itself made a party plaintiff to said action, and thereupon entered its appearance therein as such plaintiff, and thereafter participated as such a plaintiff in the litigation. In said cause, and upon the pleadings therein there was an issue between the parties as to the validity of said First Consolidated Mortgage and the covenants of the Buckeye Coal and Railway Company therein contained, including the matters and things now set up in respect thereof in the petition of the appellants herein filed December 6, 1921, and upon the trial thereof, the Court of Common Pleas by its judgment upon the merits duly given and entered January 8, 1920, found and adjudged the same against the plaintiffs therein and in favor of the defendants therein, sustaining the validity of said mortgage and covenants. Thereupon, the plaintiffs in said action appealed said cause to the Court of Appeals for said county, and at the trial of said cause upon appeal, upon the same issues, said Court of Appeals by its judgment upon the merits duly given and entered March 4, 1921, found and adjudged the same in favor of the defendants therein and against the plaintiffs therein, and did order, adjudge and decree that said First Consolidated Mortgage and the covenants of The Buckeye Coal and Railway Company therein contained are valid and binding obligations, and a good and valid lien upon the real property in said mortgage described, and that the petition of the plaintiffs therein be and the

same was dismissed upon the merits, with costs; and the plaintiffs therein having thereupon filed a motion for a new trial, said Court of Appeals, on consideration thereof, overruled said motion; to all of which the plaintiffs therein did except and take their bill of exceptions thereto. Thereafter on May 5, 1921, the plaintiffs in said cause, filed their motion in the Supreme Court of Ohio, for an order directing said Court of Appeals to certify the record in said cause to the Supreme Court for review; on consideration whereof, said court on June 7, 1921, overruled said motion. Neither the United States of America nor the State of Ohio was a party to said suit or represented therein.

29. A stipulation made and signed by The Hocking Valley Railway Company, Central Union Trust Company and the plaintiff, the United States of America, in respect to the hearing on June 8, 1923, on said supplemental petition and the issues made thereon. The Buckeye Coal and Railway Company and The Sunday Creek Coal Company of Ohio refused to sign said stipulation.

It is as follows, to wit:

"It is agreed by the undersigned, subject to the approval of the court, that the hearing set for June 8, 1923, on the supplemental petition filed herein by the United States on November 1, 1922, and the issues made thereon, shall be confined to the presentation of the question whether and if so to what extent the petitioner is entitled to relief and that evidence as to value and kindred matters shall be deferred until after the court passes upon that question; except that the petitioner may, if it chooses so to do, introduce evidence tending to show the amount of unmined coal recoverable from the lands of the Buckeye Coal and Railway Company included in the First Consolidated Mortgage and the present value of the 2c royalty thereon, for the purpose of enabling the court to determine the above question; also that the parties shall have the benefit of references to documents expressly referred to in their pleadings in this proceeding; also, that, for the purposes of said hearing, the petitioner admits the averments of paragraph 15 of the answer of the Central Union Trust Company in respect of the forfeiture of said lease and that The Sunday Creek Coal Company now claims title

to said coal lands, and the averments of paragraphs 19, 20, except that part of paragraph 20 wherein it is alleged 'Said stock of The Buckeye Coal and Railway Company, agreed to be sold as aforesaid, was so sold for said price of \$50,000 in consideration of the facts so recited that said property was encumbered as aforesaid, an abatement being made on that account in the price that otherwise said stock would have sold for, as without said encumbrance of said property said stock would have been of much greater value; all of which said Jones well knew,' 21, 22, 23 and 24 of the answer of said Trust Company to said supplemental petition, and the averments of paragraphs 19, 20, except that part of paragraph 20 wherein it is alleged that 'Said stock of the Buckeye Coal and Railway Company, agreed to be sold as aforesaid, was so sold for said price of \$50,000 in consideration of the facts so recited that said property was encumbered as aforesaid, an abatement being made on that account in the price that otherwise said stock would have sold for, as without said encumbrance of said property said stock would have been of much greater value; all of which said Jones then well knew,' 21, 22, 23 and 24 of the answer of the Hocking Valley Railway Company to said supplemental petition."

30. An affidavit of G. H. Dukes, verified June 7, 1923. The affidavit referred to the value, etc., of the lands of the Buckeye Coal and Railway Company and stated that there was a little over 11,000 acres of such land; that there remained therein minable, recoverable coal to the amount of 18,662,375 tons of lump coal; that the periods necessary for mining the same is estimated variously at from thirty to fifty years from 1916; that a fair royalty on such coal would be 11c per ton; that about one-eighth of said lands of said Buckeye Company were not owned by it in 1899 when it signed said First Consolidated Mortgage; that, while the Hocking Valley Railway Company owned the stock of the Buckeye Coal and Railway Company, it caused the two cents royalty reserved under Section 9 of Article 2 of the First Consolidated Mortgage to be paid to said Trust Company and said royalty was so paid up to and including part of the year 1916; and that the amount of

coal mined since then and on which no such royalty has been paid is 3,741,187 tons.

And forasmuch as the matters and things above stated do not fully appear of record herein, this statement or certificate of evidence is now presented to the court that it may be approved, signed, sealed and made a part of the record in this cause; which is accordingly done this 5th day of April, 1924.

Loyal E. Knappen,
Arthur C. Denison,
U. S. Circuit Judges.
A. M. J. Cochran,
U. S. District Judge.

Approved as a statement of the evidence. April 4, 1924.

W. O. Henderson,
Of Counsel for Appellants.

Arthur H. Van Brant,
Of Counsel for Central Union Trust Co., by John F. Wilson.

John F. Wilson,
Of Counsel for The Hocking Valley Railway Company.
Benson W. Hough,
U. S. Attorney, S. Dist. of Ohio, for United States of America.

APPELLEES' EXHIBIT A-10.

Columbus, Ohio, April 17, 1919.
The Sunday Creek Coal Company,
(Incorporated April, 1919)
Columbus, Ohio.

Gentlemen:

I desire to reorganize, merge and consolidate Sunday Creek Coal Company of New Jersey, The Buckeye Coal & Railway Company, and The Ohio Land & Railway Company and the properties of such companies, into your one corporation, without change or difference in the values of the properties, stocks, or securities to be given or received. The said three companies endorse this proposition as to consolidation and merger of them, and have also addressed a communication to you on the subject.

Of the \$4,000,000 of capital stock of the Sunday Creek Coal Company of New Jersey, I own \$3,751,200, which is all the stock that is outstanding. I also own \$240,000 of mortgages on the San Toy properties which that company owns, and on which mortgages it is liable. I also own \$2,507,000 of the \$3,934,000 of the bonds issued by that company under date of October 1st, 1914. The other \$1,427,000 bonds of that issue are owned by The Ohio Land & Railway Company.

I also own all the capital stock of The Buckeye Coal & Railway Company, (\$250,000 and all the outstanding capital stock (\$200,600) of The Ohio Land & Railway Company and \$1,312,000 of bonds issued by the latter company in 1894.

The total par value of the stock and securities so owned by me is \$8,260,800, and as I own all the capital stock of The Ohio Land & Railway Company I may fairly say that I own in addition thereto the \$1,427,000 of Sunday Creek bonds owned by The Ohio Land & Railway Company.

The three companies referred to own about 45,000 acres of coal land and a large amount of surface lands and hold leases on about 4,000 acres more. On these properties are over thirty-five mines owned and operated by tenants who pay our companies royalties on the coal taken out. The three companies referred to own six good mines now in operation, including mining plants and large amounts of mine supplies, machinery, cars and other usual mine accessories; they also own a valuable piece of railroad in the Bailey Run District.

I hereby offer to exchange all of the outstanding capital stocks of said three companies, of the par value of \$4,201,800, and also all of the bonds of said companies owned by me of the face value of \$4,059,000, the total face and par values of said stock and bonds being \$8,260,800 (not including the \$1,427,000 bonds of 1914 owned by The Ohio Land & Railway Company), upon condition that in connection with said merger and consolidation I shall receive in place thereof, as my absolute property, \$6,000,000 of your full-paid non-assessable common stock, and \$1,500,000 of your full-paid non-assessable preferred stock, which shall also pay for and satisfy the

subscription for \$750,000 of your capital stock already made.

You are also to indemnify me and save me harmless from any liability or obligation arising in any way from my management of or connection with any of said three companies or their properties or their capital stocks.

As you and your directors are already familiar with said three companies and their affairs, properties, and obligations, I trust you can answer this proposition within a very short time.

Very truly yours,

J. S. Jones.

We unite in the above transaction as a consolidation and merger of our three corporations and have addressed a communication on the subject to The Sunday Creek Coal Company organized in April, 1919.

Sunday Creek Coal Company,

By Jno. H. Winder,

Its President.

The Buckeye Coal & Railway Company,

By P. A. Coen,

Its President.

The Ohio Land & Railway Company,

By P. A. Coen,

Its President.

APPELLEES' EXHIBIT A-11.

Columbus, Ohio, April 17, 1919.

The Sunday Creek Coal Company,

(Incorporated in April, 1919)

Columbus, Ohio.

Gentlemen:

The undersigned companies are the owners of extensive mining lands and properties in Athens, Perry, Hocking and Morgan counties, Ohio, including about 45,000 acres of coal lands and leases on an additional 4,000 acres, with six good coal mines in operation, including mining plants, mine supplies, machinery, cars and other mining equipment, and a valuable line of railroad in the Bailey Run District, together with bills and accounts receivable, cash in bank, and many valuable items of tangible and intangible property used in connection with their respective businesses. There are also thirty-

five mines owned and operated by tenants upon the lands of the undersigned from which large amounts of royalties are derived.

All of the outstanding stocks and bonds of the undersigned, are owned by Mr. J. S. Jones as follows, to-wit: of the \$4,000,000 capital stock of Sunday Creek Coal Company of New Jersey, \$3,751,200; \$250,000 capital stock of The Buckeye Coal and Railway Company; \$200,600 capital stock of The Ohio Land and Railway Company; \$240,000 mortgage bonds on the San Toy properties owned by Sunday Creek Coal Company of New Jersey; \$2,507,000 of the \$3,934,000 October 1st, 1914, bonds of Sunday Creek Coal Company of New Jersey; and \$1,312,000 bonds of The Ohio Land and Railway Company issued in 1894. The remaining \$1,427,000 of 1914 bonds of Sunday Creek Coal Company of New Jersey are held by The Ohio Land and Railway Company and in substance are also owned by Mr. Jones. The total par or face value of stocks and securities so directly owned by Mr. Jones is \$8,260,800, to which may be added the \$1,427,000 of 1914 bonds of Sunday Creek Coal Company of New Jersey held by The Ohio Land and Railway Company.

It would manifestly be more economical, and would promote the efficiency of the organization, if the undersigned companies should be merged and consolidated into a single corporation. Inasmuch as Mr. Jones owns all of the stocks and bonds of the undersigned companies and is desirous that such merger or consolidation shall be made, and is willing to accept the stock in the merged or consolidated company in place of the stocks and securities now owned by him in the constituent companies, the undersigned are desirous of bringing about such merger or consolidation as herein proposed. We understand he has caused you to be incorporated under the Ohio laws for the purpose of bringing about such merger or consolidation into your company.

The undersigned hereby propose to merge and consolidate all their properties and interests of every nature and character into your company, which was organized in April, 1919, in consideration of the issue by you to Mr. Jones of 15,000 shares of your fully paid non-assesable preferred stock, and 60,000 shares of your fully paid non-

assessable common stock in exchange for all the stocks, bonds and securities owned by him as above set forth. We have read a proposition made by him to you under this date and approve the same. If that proposition is accepted by you and carried out, we will, at any time, on your request, consummate such merger or consolidation by all such conveyances and transfers as may be deemed necessary or advisable by the officers of your company. We understand your entire property will consist only of the properties, rights, and businesses of the undersigned, so that your capital stock will take the place of the capital stocks and securities now owned by Mr. Jones, without change in the values thereof.

Very truly yours,

Sunday Creek Coal Company of New Jersey,

By Jno. H. Winder,

President.

The Buckeye Coal and Railway Company,

By P. A. Coen,

President.

The Ohio Land and Railway Company,

By P. A. Coen,

President.

CLERK'S CERTIFICATE.

The United States of America, Southern District of Ohio, Eastern Division, ss.:

I, _____, clerk of the District Court of the United States of America within and for the division and district aforesaid, do hereby certify that the foregoing is a true and complete transcript of the proceedings had by and before said court in the above entitled cause, as the same appears of record and on file in the clerk's office of said court.

In witness whereof, I have hereunto set my hand and affixed the seal of said court at the city of Colum-

bus, Ohio, this _____ day of _____, 1924.

Clerk.

By _____,
Deputy.

MAR 13 1924

WM. R. STANLEY

IN THE
Supreme Court of the United States.

OCTOBER TERM, 1924 1925

No. **51**

THE BUCKEYE COAL & RY. CO. ET AL.,
Appellants,
vs.

THE HOCKING VALLEY RY. CO., CENTRAL
UNION TRUST CO., THE UNITED STATES OF
AMERICA, ET AL.,
Appellees.

Appeal from the United States District Court for the Southern
District of Ohio.

BRIEF FOR APPELLANTS.

WILLIAM BURRY,
W. O. HENDERSON,
Solicitors for Appellants.



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IN THE
Supreme Court of the United States.

OCTOBER TERM, A. D. 1924.

No. 368.

THE BUCKEYE COAL & RY. CO., ET AL.,
Appellants,

vs.

THE HOCKING VALLEY RY. CO., CENTRAL
UNION TRUST CO., THE UNITED STATES OF
AMERICA, ET AL.,
Appellees.

Appeal from the United States District Court for the
Southern District of Ohio.

STATEMENT OF THE CASE.

The original litigation here involved was begun by the United States against the Lake Shore & M. S. Ry. Co., The Hocking Valley Ry. Co., The Sunday Creek Coal Co. and various other railroad and coal companies, to force the dissolution of a combination of railroad companies and coal companies operating chiefly in the State of Ohio. The original cause was entitled *The United States v. The Lake Shore and Michigan Southern Ry. Co., The Hocking Valley Ry. Co., The Sunday Creek Coal Co., et al.*

A decree was entered in the cause finding an unlawful combination, ordering the combination of railroads to be dissolved and ordering all the railroad companies to

sell or otherwise dispose of all of their holdings in coal-producing properties located on their lines of road to persons or interests other than such railroads.

The present appeal is from an order of the court (rec. 115) denying and dismissing a petition of the Buckeye Coal Co. and the Sunday Creek Coal Co. which asked the court to force the Hocking Valley Ry. Co. to obey that decree and to sell or otherwise dispose of its interests in its coal properties, which that railroad company still holds. A similar petition (rec. 62) asking like relief was filed by the United States (original complainant) and that petition was also dismissed. The United States, however, did not appeal from the order of dismissal.

This cause was certified under the act of February 11, 1903, as an act to expedite the hearing and determination of suits in equity, etc., and was heard by the then three circuit judges. An appeal in this cause is therefore direct to this court.

History of the Case.

After issues had been made in the original litigation, a great deal of testimony was taken and an opinion was rendered holding the equities of the case to be with complainant, the United States, that an illegal combination existed as charged in the bill and that a decree should be entered directing a dissolution of the combination, and particularly directing that the railroads should dispose of, by sale or otherwise, all interests of any kind that they had in the coal mines and properties along their lines of railroad. That opinion is reported as *United States v. Lake Shore & Michigan Southern Ry. Co., et al.*, 203 Fed. 295. It also appears on pages 117 to 147 of the present printed transcript of record, with an opinion by one of the judges, concurring in part and dissenting in part, beginning on page 147.

A final decree was entered upon that opinion on March 14, 1914 (erroneously printed as 1924 on page 165 of the record) and appears as pages 165 to 183 of the printed transcript of record. That opinion shows the different railroads and coal companies made parties defendant; the shipping and the movement of coal over the different railroads; the competition that at one time existed among the different railroads for carrying coal; the combination of all the railroads; the stifling of competitive rates, and the acquisition by the railroads, in various ways, of a number of coal companies, of a number of coal mines and of large areas of coal lands.

The decree (rec. 165) makes a number of findings of fact closely following the opinion, recites the various ways in which the combination was effected and complete control of the entire coal district in that part of Ohio acquired, directs dissolution of the railway combination and orders that each and all of the railroad companies

"be and they hereby are perpetually enjoined from directly, or indirectly, owning, holding or acquiring any stock in said Sunday Creek Company, or in any of the companies hereinbefore named, the property of which is owned, leased or controlled by said Sunday Creek Company, intending hereby to impose an absolute prohibition against said railway companies, or any of them, owning or controlling any shares of stock in said Sunday Creek Company, or otherwise owning or controlling, directly or indirectly, any interest in any of the coal properties in which that company is interested" (rec. 178).

At that time The Sunday Creek Company held a long time lease of all the property of The Buckeye Coal and R. Co. (rec. 7, 12, 27).

The decree gave the railway companies two months in which to carry out the separation and authorized the sale of the stock of the Sunday Creek Coal Co. free and

clear from any liens thereon in favor of the railroad companies or of the Central Trust Co. of New York, as trustee under the Hocking Valley Ry. Co. consolidated mortgage. It further provided that the name of any proposed purchaser of any of the coal company stock or property should be submitted to the court for examination to ascertain if the sale was *bona fide*; provided that if such sales were not made a receiver should be appointed to sell the coal properties; made the same provisions (rec. 180 *et seq.*) concerning other coal properties; and provided that such properties should be sold free from encumbrances, etc.

The decree also provided (rec. 183),

“That jurisdiction of this cause be retained by this court for the purpose of making such other and further orders and decrees as may be necessary to the due execution of this decree and the complete dissolution of the combination and monopoly herein condemned.”

In 1915, the Hocking Valley Ry. Co. presented a petition asking leave of the court to sell certain stocks and bonds of the Buckeye Coal Co. and of the Ohio Coal Company to Mr. Poston. In an opinion appearing on pages 183 to 189 of the printed transcript and filed July 30, 1915, (erroneously printed as 1914) the court refused to approve the sale, principally on the ground that part of the consideration moving to the railway company was income bonds upon the property, to be held by the railway company or its trustee, the Central Trust Company, as pledgee (rec. 185-8), and the court held that thereby the railway company would retain an interest in the coal properties, which was forbidden by the main decree of March 14, 1914, thus deciding that no revenue from the coal lands could go to the mortgage trustee to be applied on the bonds of the railway company.

In the opinion the court said (rec. 184):

"We cannot too often repeat that the prime purpose of our decree was to insure the complete separation of the railroad interests from the coal-mining interests, so that the former should not and could not dominate the latter. The possibility that such control may be accomplished through ownership of mortgage bonds and the agency of the trustee or through a foreclosure and purchase, is more remote and contingent than the prospect that it would follow from stock ownership; but substantial domination in the former manner may be no less effective."

Complying with a suggestion made in the opinion just referred to, on October 9, 1915, the United States, original complainant, filed a petition (rec. 189) setting up that the Hocking Valley had not obeyed the original decree in that it still held title to a large number of shares of the capital stock of the Buckeye Coal & Railway Co. and of capital stock and bonds of the Ohio Land & Railway Co. (both coal companies) and in certain other coal properties, and that such stock was pledged with the Central Trust Co. as trustee of the Hocking Valley First Consolidated Mortgage securing \$20,000,000 of 100 year 4½ percent bonds, as additional collateral security therefor, and praying that the Hocking Valley Ry. Co. be required to sell and dispose of all such stock and bonds free and clear of any lien of its said mortgage.

To that petition the Hocking Valley Ry. Co. filed an answer (rec. 192) denying certain of the allegations of the petition and setting up that the capital stocks referred to were pledged with the trustee of its first mortgage bonds. The trustee under that mortgage, the Central Trust Company, also filed an answer (rec. 194) setting up principally that the capital stocks of the coal companies, which the government asked to have sold, had been pledged with the trust company to secure the bonds issued under the Hocking Valley Ry. Co. first mort-

gage, and that the lien of that mortgage could not be interfered with.

The trustee also insisted that the reservation of jurisdiction in the original decree was not sufficient to enable the court to enter an order for the sale of the capital stocks referred to, and insisted that the court was without jurisdiction to entertain the petition.

On May 19, 1916, the court entered an order (rec. 201), containing its reasons for the order and holding that it had retained jurisdiction of the subject matter and the parties for the purpose of carrying out the decree of March 14, 1914, to the fullest extent, and it had authority to order the sale of the stock free from the lien of the mortgage upon giving the trustee, for the use of the bondholders, a fair consideration for the property so ordered to be sold. In two notes of opinion attached to the order so entered and appearing at the foot of pages 205-208, the court gave its reasons, to some extent, for entering the order, saying:

"We regard as clear the power of the court to compel the bonds and stocks to be sold free from the lien of the consolidated mortgage, substituting therefor in the hands of the mortgage trustee the proceeds of such sale. One who takes a mortgage upon several items of property of such character that their common ownership or operation may offend against the anti-trust law or the commodities clause, and such that the mortgage serves practically to aid in tying them together, must be deemed to hold his mortgage subject to the contingency that if the complete and final separation of one item of the mortgaged property from the remainder becomes essential to the due enforcement of either named law, the court charged with such enforcement may take control of that item, free it from the consolidating tendency of the mortgage, and substitute therefor its judicially ascertained equivalent. * * *

"If the power exists to direct a sale free from lien, the conditions here found make appropriate the

exercise of that power. The consolidated mortgage was given by a railroad and a coal company; it challenged attention to those features which carried potential violation of laws already passed or which might be passed; and the values of these pledged stocks and bonds, having nothing except lands to give them value, can be determined with such substantial accuracy that there is little danger of a mistake seriously prejudicial to the mortgagee. We would have no confidence that a sale of the mere equity of the Hocking in these stocks and bonds would bring more than temporary independence. The purchaser could not free them from the overwhelming mortgage nor compel its foreclosure, but the danger of foreclosure and the consequent wiping out of this equity would be constant. The influence, if not the practical domination, of the railroad mortgagor, upon whom the purchaser must rely to prevent foreclosure, could not be escaped." (rec. 208.)

From that order the Central Trust Company, trustee, took an appeal to this court, but afterward abandoned the same (rec. 212).

In pursuance of the order so entered by the district court, the capital stock of the Buckeye Coal Co. and the capital stock and bonds of the Ohio Land Co. were sold to John S. Jones and the sale was approved by the court November 10th, 1916. The price paid by Jones was \$400,000 for the stock and bonds of the Ohio Land Co. and \$50,000 for the stock of The Buckeye Coal Co., or \$450,000 in all, and the purchase money was paid to the mortgage trustee to be applied on the bonds. The amount paid for the capital stock of the Buckeye Coal Co. was due in part to the fact that the Buckeye Co. had mortgaged its lands as additional security for the \$20,000,000 mortgage of the Hocking Valley Ry. Co., but principally because all its lands were then under a long time mining lease to the Sunday Creek Coal Company (rec. 7, 12, 27). Probably that lease did not provide for any minimum production, thereby leaving it in the

power of the Sunday Creek Coal Co. to leave the coal unmined for years, thus escaping payment of royalties, and the Sunday Creek Coal Co. could, during such delay, mine coal from lands which it owned or from lands which it had leased with an agreement that it would mine a certain amount of coal from them in each year.

It is hardly necessary for us to here state the formation of the combination of railroad and coal properties which was denounced in the decree of March 14, 1914. We cannot state it as well or as succinctly as it was stated by the court in its opinion on pages 117 *et seq.* of the printed record and set out in the findings of the decree on pages 165-173 of the record.

For the sake of continuity of argument we would state that in 1898 there was pending in the federal court in Ohio foreclosure proceedings which affected several railroads controlling most of the coal-carrying trade of a large part of Ohio, together with several coal companies, coal operations and coal fields in the territory served by those railroads. Late in that year a foreclosure decree was entered directing the sale of all the railroads and coal properties involved in the litigation. At the foreclosure sale held early in 1899, a committee of bondholders, represented by Ingalls & Gardiner, bought in all the railroad and coal properties. A plan of organization dated January 4, 1899 (rec. 55) had been promulgated by J. P. Morgan & Co. (opinion, rec. 126; decree, rec. 172) for a combination of the several railroads, coal companies and coal properties involved in the decree of foreclosure.

At that time The Buckeye Coal & Ry. Co. was organized to take over and hold principally, if not wholly, the coal properties formerly held by the Hocking Coal & R. Co. and embraced in the decree. There were involved

in the combination six or seven railroad properties and a number of coal companies and coal lands mentioned in the decree and opinion of the court above referred to.

The Hocking Valley Ry. Co., a new company formed under the scheme of reorganization referred to, at that time issued \$20,000,000 of its first mortgage $4\frac{1}{2}\%$ bonds and to secure the same gave a first mortgage upon its railroad properties and also required The Buckeye Coal & Ry. Co., all of whose capital stock had been, under the scheme of reorganization, given to the Hocking Valley Ry. Co., to sign the mortgage and pledge its property as additional security to the bonds so issued. The Buckeye Co. was not, however, required to sign the bonds. It only pledged its property as surety. The capital stock of the Buckeye Co. owned by the Hocking Valley Ry. Co. was, however, by the latter company pledged to the mortgage trustee, the Central Trust Co., as collateral security, as was also the stock of a number of other coal companies, including the stock of the Sunday Creek Co.

It was against this combination of railroads and coal properties that the United States filed its bill in this case, and concerning which the opinions were delivered and the decrees entered to which we have heretofore referred.

That main decree was entered March 14, 1914. Late in that year in obedience to that decree the stock of the Sunday Creek Coal Co. was sold to John S. Jones, coal operator, free from the lien of the mortgage. The court examined Jones, and finding that he was not in any way acting for railroad interests. It approved the sale to him (rec. 212).

Then followed the application for leave to sell to Poston, the denial thereof, the application of the United States to force the sale of the Buckeye Co. stock and the granting thereof.

The mortgage securing the \$20,000,000 bonds of Hocking Valley Ry. Co. contained a provision for a royalty of two cents to be paid on the bonds, and section 9 of article 2 of the mortgage is as follows (rec. 15, 216) :

"Sec. 9. On July 1st, 1900, and on or before July 1st, in each and every year thereafter, the Coal Company shall deliver to the Trustee a statement in writing showing the amount of coal mined from lands owned by the Coal Company, and mortgaged hereunder, during the year ending with the 1st day of March next preceding the date of such statement, and simultaneously it shall pay to the Trustee hereunder a sum equal to two cents per ton on all coal so mined during such preceding year.

"All sums so received by the Trustee shall by it be used and applied in purchasing bonds hereby secured, in such manner as to it shall seem best, and at such prices as it shall deem best, not exceeding the rate of one hundred and five per centum and accrued interest. All such bonds when so purchased shall be canceled. All sums so received by the Trustee and not by it so used within six months from its receipt thereof, shall be returned to the Coal Company."

At the time the court, in October, 1916, forced the sale of the capital stock of the Buckeye Coal Co. and the stock and bonds of the Ohio Land Co. to Jones, a contract was made between the seller and the purchaser (rec. 57), and that contract was approved and the sale ordered by the court. There was evidently a dispute between the seller and the purchaser as to whether the property of the Buckeye Co. would remain subject to the \$20,000,000 mortgage and be obliged to pay the 2c royalty referred to in sec. 9, art. 2, above referred to. It is recited in that contract in Clause (c) that such a mortgage had been made and there were evidently various claims made by the purchaser and seller against each other, for paragraphs "Fourth" and "Fifth" (rec. 60-61) provide for mutual releases of all claims;

"except that nothing in this Article Fifth, or else-

where in this Agreement contained is intended or shall be construed in any wise to limit or affect or impair the several covenants or obligations of the Buckeye Company contained in said First Consolidated Mortgage of the Hocking Company, and the Hocking Company and the Chesapeake Company respectively do not hereby waive or release the Buckeye Company, its successors or assigns from any such covenants and obligations."

This quotation shows that the contract was not "to limit or affect or impair the several covenants or obligations of the Buckeye Company contained in" the railway mortgage. That question was, therefore, left open. So far as that contract went, nothing was agreed on concerning that question. If the act of the Buckeye Company in making itself surety upon the mortgage and pledging its lands was unlawful and void because it was part of the combination of railroad and coal properties so vigorously denounced by the court in its opinions and decrees, that *status* remained unchanged. If for that reason any liability on a foreclosure or any liability on the 2c royalty imposed by Section 9 of Article 2 of the mortgage was unlawful and against public policy and the Sherman act, such void covenants were not ratified in any way by the Buckeye Company, for nothing in the contract should in any wise "affect" the several obligations or covenants of the Buckeye Company contained in the mortgage.

While the Hocking Valley Co. owned all the Buckeye Company stock, while the railroad and the coal company were under the same control, the Buckeye Company, of course, paid to the railroad company the 2c royalty referred to. From the time they were separated by order of the court in November, 1916, no statement was made and no royalty was paid, and it may be taken that the Buckeye Company, under the management of Jones, be-

lieved that the making of the mortgage and with it the provision concerning royalty were part of the illegal combination denounced by the court, and that, therefore, no royalty was due; and the Hocking Valley Co. and its trustee probably thought that it would some day seek to enforce the collection of the 2c royalty.

The position of the Buckeye Company as surety only was, however, acknowledged in the contract, for the last sentence of the Fifth provision is as follows (rec. 61):

"If the Hocking Company at any time defaults in the payments or other obligations imposed on it by said consolidated mortgage, and said mortgage is enforced or foreclosed in any way or to any extent, the Hocking Company agrees that it will cause all the property of the Hocking Company to be first exhausted before any recourse is had under said mortgage to the property of the Buckeye Company and agrees to indemnify and to save and hold harmless said Buckeye Company from any loss or damage to or payment by said Buckeye Company under the provisions of said mortgage, save only said two cents per ton royalty above-mentioned."

The next step taken was by the mortgage trustee bringing suit in January, 1919, in the Federal Court in Ohio against the Buckeye Coal Co. to collect from it the 2c a ton royalty on coal mined after March 1, 1916, which suit is still undisposed of as appears by the answer of the Hocking Valley in this case (rec. 23-4).

Thereupon, as appears from the same answer (rec. 25-6, also 246) the Buckeye Coal Co. on April 21, 1919, commenced a civil action against the Central Trust Company, trustee, and the Hocking Valley Ry. Co. in the Court of Common Pleas of Perry County, Ohio, where the land was situated, to quiet its title to said lands, and afterward the Sunday Creek Coal Company was made a party plaintiff.

The Sherman Anti-Trust act was not involved in that

suit to quiet title; no person represented the public; neither the United States nor the State of Ohio was present. It was simply a private suit between the persons named, relying on the decree of March 14, 1914, and being such suit, the court of common pleas, in January, 1920, decided the case on the merits in favor of defendants, thereby for the purposes of that suit sustaining the validity of the mortgage. That court disregarded all public policy, disregarded the opinions and decrees of the federal court in this case, and treated the suit simply as a private dispute between the parties named.

The plaintiffs then carried that case to the state court of appeals for Perry County, and upon a hearing there a like judgment was entered in that court. Thereafter, on May 5, 1921, plaintiffs in that cause filed their motion in the Supreme Court of Ohio for *certiorari* to bring up the record for review, and that court on June 7, 1921, overruled that motion (rec. 247).

Thereupon, on December 6, 1921, the Buckeye Coal Co. and the Sunday Creek Coal Co. filed the petition herein which is now before the court on this appeal (rec. 7-11). That petition sets up the main decree herein of March 14, 1914, which held the combination of railroad and coal properties illegal, referred to portions of the opinions pronounced and decrees entered herein, referred to section 9, article 2 of the mortgage providing for the 2c royalty, and prayed that the lands of the Buckeye Coal Company be released and eliminated from said mortgage and particularly from the 2c royalty provision thereof, *or that all the interests of the railway company and its trustee be sold* or that other appropriate relief be given. To this petition, about four pages long, we respectfully call the attention of the court. It is our main document.

While this petition was pending, the United States, original complainant, presented a petition substantially

the same in all its averments of facts as the one presented by the Buckeye Co. (rec. 62 *et seq.*)

The prayers of these petitions by the Buckeye Co. and by the United States differ somewhat, but the main object of the petitions and of the prayers is the same—to complete the separation of these railroad properties and coal properties called for by the decree of March 14, 1914, by releasing the coal lands from the lien of the railway mortgage and by taking from the railway and its mortgage trustee a right to 2c royalty on all coal mined from the lands of the Buckeye Co., by sale of those interests or otherwise.

The Hocking Valley Ry. Co. and its mortgage trustee filed answers, substantially the same, to these two petitions. They set up and rely upon what was done under the reorganization scheme, dated January 4, 1899, submitted by Morgan & Co. and fully carried out—the same scheme that met the unqualified condemnation of the court below in this cause and which was set aside as illegal by the decree of March 14, 1914 (rec. 12, 27).

The answers and the uncontradicted evidence in support thereof set out that the purchasers at the foreclosure sale held in January, 1899, acquired the different railroad properties and coal companies and coal properties described in the decree; that the Hocking Valley Ry. Co. was then organized to take over some or all of the railroad properties; that the Buckeye Coal Co. was then organized to take over and hold part of the coal properties so acquired by the purchasers; that it was provided that the Hocking Valley Ry. Co. should mortgage its property to secure an issue of \$20,000,000 of bonds; that the mortgage should include the coal lands of the Buckeye Co., and that the Buckeye Co. should sign the mortgage but not the bonds. The answers set up also that the coal lands were placed in the name of the Buck-

eye Coal Co. upon no consideration passing to the purchasers other than the agreement of the Buckeye Co. that it would sign the mortgage covering such lands when the mortgage was made. No other than a like consideration is shown to have been paid by the Hocking Valley Ry. Co.

The proposition of the purchaser (rec. 53) to convey these lands to the Buckeye Coal & Ry. Co. on condition it should join in the mortgage, is dated February 25, 1899. The resolution of the company of February 25, 1899, accepting the proposition appears on page 55 of the record. The contract between the Buckeye Coal Co. and the purchasers (rec. 45) is dated February 25, 1899. The deed from the purchasers to the Buckeye Co., dated February 25, 1899, appears on page 48 of the record. Each of these documents provides the Buckeye Co. will mortgage the property so acquired by it under the Hocking Valley Ry. Co. general mortgage and various other provisions are made, but in none of the documents referred to is there any mention made of reserving a 2c royalty as a sinking fund for the mortgage.

The resolution of the Buckeye Co. (rec. 55) provides that the proposition be accepted under the provisions and conditions therein stated, but no mention is made of the 2c royalty. That provision was evidently an afterthought. The \$20,000,000 mortgage is abstracted beginning on page 215 of the record and recites (rec. 217) that at a meeting of the board of directors held February 25, 1899, the president and secretary of the company were authorized and directed to execute the first consolidated mortgage "substantially of the tenor of the draft thereof now submitted in this meeting upon all the real estate, lands and tenements of this company heretofore acquired by this company" from the purchasers. Nothing is said

in that resolution about the 2c royalty. When, however, the mortgage came to be finally executed it contained section 9 of article 2 providing for the 2c royalty.

All the capital stock of the Buckeye Co. was issued to the Hocking Valley Ry. Co. and under its direction the Buckeye Co. did sign the mortgage referred to.

In hearings had before the lower court on the above petitions, all the documents we have referred to were introduced in evidence. A certificate or statement of evidence introduced was prepared and filed, and it appears beginning on page 214 of the record.

On January 18, 1924, the court filed an opinion (rec. 109) on these two petitions and on the same day entered an order dismissing the petition of the Buckeye Company and also the petition of the United States, but without prejudice to the right of the United States to make further application if it thought the situation sufficient to justify such further application.

The Buckeye Company prosecutes this appeal from that order.

ERRORS RELIED ON.

1. The District Court erred in dismissing the petition of the Buckeye Coal & Railway Company and The Sunday Creek Coal Company filed in said cause on or about December 6, 1921.
2. The District Court erred in denying the relief or any part of it prayed for in said petition.
3. The District Court erred in denying that part of the prayer of said petition, asking "That all the lands of said Buckeye Company, be released and eliminated from said mortgage, and particularly from said Section 9 thereof."
4. The District Court erred in denying that part of the prayer of said petition asking "That all interest or interests of said railway company and said trust company in said property be sold and for such other and appropriate order herein as will effectively carry out the purpose and effect of the main decree entered herein" on March 14, 1914.

BRIEF OF ARGUMENT.

The Main Opinion Given and Decree Entered in This Case Hold the Entire Combination of the Railroad and Coal Properties Under the Reorganization Scheme of January 4, 1899, to Be Illegal and Fraudulent.

United States v. Lake Shore & So. Ry. Co. et al.,
205 Fed. Rep. 295.

Same opinion printed in present record at page
117.

That opinion was pronounced in December, 1912, and decree entered March 14, 1914. The courts of Ohio had previously, in 1909, held the combination illegal and void.

State ex rel v. Railway, 12 Ohio Cir. Ct. R. (N. S.) 49, 145, cited in 203 Fed. 300.

To the same effect is,

Continental Co. v. United States, 259 U. S. 156.

The case at bar differs from *Continental Co. v. United States*, *supra*, in that the Buckeye Coal Co. was not liable upon the bonds issued. It did not sign the bonds and was not liable for them, and only signed the mortgage as surety. In the *Continental Co.* case it appears that part of the issue of the bonds had been used for the benefit of the coal company and the coal company had signed the bonds.

Therefore, in the present case the Buckeye Co. should not be required to contribute anything on the separation. However, our petition asks that, if equity requires it, any interest the mortgage trustee has in the Buckeye Co. lands should be ascertained and sold.

The Provision of the Mortgage Reserving a 2c Royalty to Be Applied on the Hocking Valley Railway Company Bonds Is Unauthorized and Illegal.

There is no resolution by the stockholders or directors of the Buckeye Coal Company showing any authority for giving a 2c royalty.

Neither the proposal of the purchasing committee to transfer the coal lands to the Buckeye Company, nor the resolutions of the directors and stockholders of the Buckeye Company accepting that proposal, nor the contract between the purchasing committee and the Buckeye Company made pursuant to that proposal, nor the deed from the purchasing committee to the Buckeye Coal Company transferring the property, makes any reference to such 2c royalty. The recital in the mortgage is that the Buckeye Company authorized the mortgage *substantially* in the form then being executed (rec. 53, 57, 45, 48).

The insertion of a 2c royalty to apply on bonds which the Buckeye Company had not signed and on which there was only a surety is incongruous.

The provision for a 2c royalty is clearly illegal and objectionable as being an interest in the coal land retained by the railway company in violation of the main opinion and decree in that case and of the principles laid down in *Continental Company v. United States*, 259 U. S. 156.

**The Opinion of the Court Denying the Present Petitions
for the Sale by the Hocking Railway Company of Its
Remaining Interests in the Buckeye Company Coal
Lands Is Not Well Considered and Is Erroneous.**

That opinion misstates the prayer of the Buckeye Coal Company petition in stating that it asks that the mortgage be released without compensation. The prayer is that the mortgage ought to be released without compensation, or in the alternative, that if the court thinks meet, the value of the remaining interests in the coal lands be ascertained and sold.

The lower court expresses a doubt (rec. 113) as to a continuing jurisdiction of the lower court to compel complete dissolution of the condemned combination of railroad and coal properties. In this the opinion is clearly erroneous.

The court refused to allow a sale of the Hocking Valley Company's interests in the Buckeye Coal Company land to Mr. Poston, because part of the consideration to be paid by him was income bonds secured upon the coal property, holding that thereby the Railway Company retained a substantial interest in the Coal Company's property. The same court now, by dismissing the petitions, refused to require the sale of the very substantial interests retained by the Railroad Company in the coal lands through reservation of a royalty and by a mortgage which subjects the coal lands to that mortgage (rec. 183, 109). This is also in conflict with *Continental Co. v. United States*, 259 U. S. 156, 167.

The lower court erred in its opinion in holding that the mortgage lien and the royalty provisions of the Hocking Valley Railway mortgage were inconsequential burdens on the Buckeye Coal Company.

It was shown on the hearing that over 18,000,000 tons of lump coal were still to be taken from the Buckeye Company lands and 2c royalty on this amount of coal would be a heavy burden (rec. 248).

The burden of the mortgage on the Buckeye Coal Company is also heavy, because it acts as a cloud upon its title to all its lands and also destroys any allowance therefore as invested capital under the rulings of the income bureau of the Treasury Department.

The Controlling Effect of the Decrees of the Federal Court Over the Decree of the State Court.

The action of the state court, when the Buckeye Coal Company filed its suit to clear a cloud upon the title to its lands, was contrary to the prior decree entered in this cause on March 14, 1914, and in conflict with the several other decrees entered by the lower court.

The Lower Court Also Erred in Intimating in Its Opinion That It Would Be Inequitable to Relieve the Buckeye Coal Company from the Lien of the Mortgage Because It Agreed to Sign the Mortgage as Surety When It Acquired the Lands.

The Hocking Valley Railway Company acquired its railroad from the purchasers' committee who purchased the property in 1899. The railroad company paid nothing therefor but the issuance of its stock and the making of the railway mortgage, on which however, it concedes the Buckeye Coal Company is only a surety. The Buckeye Company acquired its property from the purchasers'

committee on substantially the same terms, namely, the issuing of all its stock therefor and signing as surety the Railway Company mortgage. The Railway Company has agreed to indemnify the Buckeye Coal Company for signing that mortgage. There is, therefore, no equity in the Railway Company's now attempting to hold the mortgage on the property of the Buckeye Coal Company or in attempting to force that Company to now contribute a royalty towards the payment of the Railroad bonds which it did not sign and for the payment of which it only pledged its property as a surety.

Under such circumstances it would be inequitable for the Hocking Valley Railway Company to insist that the lien of the mortgage be continued or that any royalty be paid.

The position of the Buckeye Coal Company is in accordance with the settled law of this case and is not inequitable.

East St. Louis v. Jarvis, 92 Fed. 735.

McMullin v. Hoffman, 174 U. S. 639.

13 C. J. 489.

The position of the trustee under the railroad mortgage is no better than that of the Railway Company, for the mortgage was one signed by a railroad company and a coal company and therefore bore upon its face notice of a potential illegality which has now become certain by the opinion of the lower court in this case and the orders and decrees entered in this case (rec. 208). And that position is upheld in *Continental Co. v. United States*, 259 U. S. 156, 172.

The Opinion by Judge Lurton, 85 Fed. 815, Relates Only to *ultra vires* and Is Not in Any Way Concerned with Public Policy or the Sherman Anti-Trust Act.

ARGUMENT.

The Scope of the Main Opinion and Decree.

We cannot state more strongly than has the lower court in its opinions above referred to, the object and scope of the original bill in this cause and of the decree rendered thereon on March 14, 1914. That decree found that the entire combination of these railroad and coal properties under the Morgan scheme of reorganization, dated January 4, 1899, was illegal and fraudulent, especially under the Sherman Anti-Trust law.

In the lower court's opinion (203 Fed. 295; rec. 117) the court gave the history of the competitive conditions prevailing in the Ohio coal field prior to January 4, 1899; the stifling of competition, and the combination of the different railroads and the different coal properties in one management brought about by the reorganization in 1899, and held them illegal under the Sherman anti-trust act. Under the history of these railroad and coal operations as given in the opinion and decree referred to, the combination and the stifling of competition was also undoubtedly illegal at common law.

From the main opinion in this case it appears that the courts of Ohio also held illegal the 1899 scheme of reorganization and the consequent combination of railroad and coal properties. In that opinion the court said (rec. 121):

"The combination and conspiracy averred originated in 1899 and have as alleged been continued in one form or another ever since. What happened between that time and the year 1909 resulted in a suit in *quo warranto* by the State of Ohio against the Hocking Valley. *State, ex rel., v. Railway*, 12 O. C.

C. (N. S.) 49, 145. The first decision in that case was rendered April 24, 1909, and upon rehearing adhered to July 21 of that year; and on January 18, 1910, the court made a finding of facts, with separate conclusions of law thereon (set out in the present record), in terms ousting the Hocking Valley from the power of owning and holding shares of stock in the Kanawha & Michigan, the Buckeye Coal & Railway Co., the Sunday Creek Coal Co., the Sunday Creek Co., and the Continental Coal Co.;" etc.

The vice of the combinations referred to and which the court sought to suppress is that a railroad company will in some way or other favor its own coal mines or any other coal production in which it has even a remote interest. The ruling of the court (rec. 183) on the attempted sale to Poston was that as long as the Hocking Valley Ry. Co. or rather its mortgage trustee had an interest in the coal lands by way of an income bond thereon, the decree of March 14, 1914 was not complied with, for the railroad company would be inclined to favor the Poston coal properties, to which it must look for payment of interest and finally of principal of those income bonds. How complete that separation must be is also shown by the quotations we have made from what the lower court said when dealing with the sale of the Buckeye Coal Co. stock in 1915 and 1916 (rec. 201).

Nothing can possibly comply with that opinion and decree other than a complete separation of all coal interests from all railroad interests in the territory and between the parties dealt with by the court.

That principle of complete separation has become the fixed law of this case. Even if the lower court desired to change the decree of March 14, 1914, it is too late for it to do so. That decree is the law of this case. Moreover, the construction placed on that decree by the court in 1915-6 in dealing with the sale of the capital stock of

the Buckeye Coal Company has also become the law of this case, and the lower court is bound by it.

THE COMBINATION OF THE RAILROAD AND COAL PROPERTIES
UNDER THE MORGAN SCHEME OF REORGANIZATION, DATED
JANUARY 4TH, 1899 WAS ILLEGAL.

United States v. Lake Shore & M. S. Ry. et al.
203 Fed. 295; Record 117, 165.

The opinion and decrees of the lower court, even if they could now be reviewed, correctly state and apply the law. It would be possible to present many cases in support of the main decree entered herein on March 14th, 1914, and of the proceeding and decree which in 1915-6 forced the sale of the capital stock of the Buckeye Coal Co. and the Ohio Land Co. free from the lien of the mortgage of the Hocking Valley Ry. Co. securing the \$20,000,000 of bonds, but we will only cite one. We refer to the recent case of *Continental Co. v. United States*, 259 U. S. 156. One phase of the latter case, the one discussed in the opinion on pages 170-6, is very analogous to this case and to the relief asked by us in our petition filed December 6th, 1921, and which the lower court dismissed by the order from which this appeal is taken.

The *Continental Co.* case, indeed, quotes with approval from the order and opinion of the lower court in the case at bar, pronounced in 1916, which directed sale of the capital stock of the Buckeye Coal Co. and the Ohio Land Co. free from the lien of the trust deed to the Central Trust Co. The procedure approved in the *Continental Co.* case is applicable and ought to be decisive in favor of granting the present petition which asks that the remaining interest of the railroad company in the coal properties be disposed of.

All the elements in the *Continental Co.* case that required dissolution of the combination there existing, obtain in the present case. The right and power of the court to take the coal properties from under the lien of the railroad mortgage upon proper terms exists in both cases. The terms of separation may differ but the illegality of such combination exists and the proper remedies are shown in the *Continental Co.* case. On page 172 it is said:

“Nevertheless, spread all over the face of the general mortgage, was the information and notice of the union of the railway and coal properties for the very purpose which is the head and front of the offending under the Anti-Trust Law and which requires this court to dissolve the illegal combination. The general mortgage was the indispensable instrument of the unlawful conspiracy to restrain interstate commerce.”

In considering this matter there is, however, to be observed an important and fundamental difference in the facts of the two cases and in the terms upon which the coal properties should be released from the railroad mortgage.

In the *Continental Co.* case the coal company had signed the bonds secured by the mortgage trust deed and was liable upon those bonds. It would appear that part of the proceeds of those bonds had been expended in improving the coal property. In the case at bar none of the moneys from the \$20,000,000 bonds are shown to have been expended on the coal property.

The Buckeye Coal Co. did not sign the bonds or assume the payment thereof. In the deed of the purchasing committee at the foreclosure sale, February 25th, 1899, and also in the agreement between the purchasing committee and the Buckeye Coal Co. of the same date it is stated (rec. 50):

“it being distinctly understood and agreed that the

Company assumes no obligation in respect to any bonds or the payment thereof, other than to pledge and mortgage, as security therefor, all property received by the Company from the Purchasers or their assigns, or according to the terms of any instrument making or conveying such property."

As the coal company did not sign the bonds and is not shown to have received any of the proceeds thereof, its act in adding its property to the mortgage and signing that mortgage was that of a surety only, and this fact is placed beyond dispute by the contract between the railway companies and Jones of October 7, 1916, when Jones acquired the stock of the Buckeye Co. The agreement in that contract is as follows (rec. 61):

"If the Hocking Company at any time defaults in the payments or other obligations imposed on it by said consolidated mortgage, and said mortgage is enforced or foreclosed in any way or to any extent, the Hocking Company agrees that it will cause all the property of the Hocking Company to be first exhausted before any recourse is had under said mortgage to the property of the Buckeye Company and agrees to indemnify and to save and hold harmless said Buckeye Company from any loss or damage to or payment by said Buckeye Company under the provisions of said mortgage, save only said two cents per ton royalty above mentioned."

In the *Continental Co.* case it was found that a proper proportion of the mortgage debt to be borne by the Reading Coal Company was about one-third of that indebtedness, and provision was made by the court that that amount of the mortgage indebtedness should be taken care of by the coal company. In the present case that element is entirely lacking as shown by the two quotations last above made.

We insist that this difference between the two cases requires that the lands of the Buckeye Coal Co. should now be declared free from all lien of the Hocking Valley Ry. Co. mortgage, so far as that railroad is concerned. :

As it appears that the Hocking Valley Ry. Co. mortgage was originally made for \$20,000,000 and that the Hocking Valley Ry. Co. has now made a \$50,000,000 refunding mortgage on its property (rec. 220), which provides that bonds shall be reserved to take up underlying mortgages, which includes what remains due on the \$20,000,000 mortgage, and as the outstanding bonds under the \$20,000,000 mortgage are recited to be \$16,022,000, and that whenever the railroad company presents to the trustee such underlying bonds to be cancelled, there shall be delivered to it like bonds secured by the said \$50,000,000 mortgage (rec. 221), and that said \$50,000,000 mortgage has been recorded and gone into effect, for (rec. 222) \$11,800,000 of those bonds have been issued as collateral to loans to the Hocking Valley Ry. Co., and that in the opinion of the lower court, filed January 18th, 1924, it is said (rec. 114):

“no suggestion is made that the railroad property is not entirely adequate to meet the payment of the mortgage in full, and the payment of the mortgage puts an end to the royalty. Indeed, an affirmative inference, more or less strong, in favor of the adequacy of the railroad security seems fairly deducible from the record presented to us.”

the coal company property may fairly be now released from this mortgage, or at least a reference be made to a master to ascertain whether the present property of the Hocking Valley Ry. Co. is not amply sufficient to pay the remaining bonds secured by the \$20,000,000 mortgage.

We submit, therefore, that under the close analogy to the *Continental Co.* case the lands of the Buckeye Coal company should now be freed from the lien of this mortgage.

THE PROVISION RESERVING THE TWO CENTS ROYALTY TO APPLY ON THE HOCKING VALLEY RY. CO. BONDS IS UNAUTHORIZED AND ILLEGAL.

The transfer by the Bondholders Purchasing Committee on February 25, 1899, of the coal lands to the newly formed Buckeye Coal Company is shown by five documents:

(a) The proposal by the committee to transfer the coal lands to the newly formed Buckeye Coal Company (rec. 53-5).

(b) The resolution of the Board of Directors of the Buckeye Coal Company, accepting that proposition and authorizing the making of a contract (rec. 55).

(c) The contract between the purchasing committee and the Buckeye Coal Company for the transfer of the property (rec. 45).

(d) The deed from the purchasing committee to the Buckeye Coal Company, transferring the property to the latter (rec. 48).

(e) Resolution of the directors of the Buckeye Coal Company approving and accepting deed (d) and directing that all the provisions of the proposal (a) of the contract (c) and of the deed (d) be carried out (rec. 57).

In none of these documents is reference made to any provision for a two cents royalty. On the contrary the contract and the deed contain language contradicting the idea of any such royalty. In the contract it is stated (rec. 47):

"it being distinctly understood and agreed that the Company assumes no obligation in respect of any such bonds or the payment thereof, other than to pledge and mortgage, as security therefor, all property received by the Company from the Purchasers, or their assigns, or according to the terms of any instrument making or conveying such property."

The same language is repeated in the deed (rec. 50).

It does not appear in the record that there was any resolution of the Buckeye Coal Company authorizing the insertion in the mortgage of such a royalty provision, unless it may be the recitation in the mortgage of the adoption of a resolution on February 25th, 1899, authorizing the execution of a mortgage trust deed "substantially of the tenor of the draft thereof now submitted at this meeting upon all the real estate, lands and tenements of this company" etc. The draft of mortgage referred to does not appear in the record. The mortgage is dated March 1, 1899, and during that interval probably the provision concerning the two cents royalty was inserted in the final preparation of the document. The mortgage further recites (rec. 32), "This indenture is *substantially* of the tenor of the draft thereof submitted to and approved by the stockholders of the Railway Company and also by the stockholders of the Coal Company" etc.

No authority, therefore, is shown for the insertion of this two cents royalty provision in the mortgage.

Moreover, the idea of such a two cents royalty to be paid by the Buckeye Co. upon bonds which it had not signed and for which it was not liable, is incongruous. Why should the Buckeye Co. provide such a fund for bonds for which it was not liable and which it had not signed? Does not the quotation above made from the contract between the Hocking Valley Railway Company and Jones, in October, 1916, also contradict the idea of this sinking fund, when it provides that the Hocking Valley Railway Company is to indemnify and save harmless the Buckeye Coal Company from any payment upon those bonds? The royalty constitutes a payment on the bonds. Does not that contract, in fact, act as a release from the provision for any such royalty

if there ever was a valid provision made therefor? It was simply to be paid to the trustee as money with which it might purchase bonds on the market at not to exceed 105%, and cancel them, with the provision that if such money was not so used by the trustee within six months of its receipt it should be returned to the Buckeye Coal Company (rec. 30).

All these things clearly indicate that there never was such a two cent royalty authorized by the Buckeye Coal Company or contemplated in the original papers, and that the provision for that royalty was simply something introduced into the mortgage by the final draftsman, perhaps at the suggestion of some over-zealous officer of the Hocking Valley Ry. Co.

This reservation of the two cents royalty was clearly illegal and most objectionable under the principle of separation of railroad and coal properties as announced in the opinions of the lower courts in this case and in the opinion of this court in *Continental Co. v. United States*, 259 U. S. 156.

Two cents a ton royalty on the ordinary forty or fifty ton coal car would mean a dollar a carload paid upon the bonds of the Hocking Valley Ry. Co. It would be a standing inducement to the railroad company for placing cars and hauling cars at and from the Buckeye Coal Company mines. It would, therefore, violate the principle calling for the separation of railroad interests from coal interests.

THE OPINION OF JANUARY 18, 1924, AND THE ORDER OF THAT DATE DISMISSING THE TWO PETITIONS ASKING FOR THE SALE OF THE INTERESTS OF THE HOCKING RAILWAY CO. AND ITS MORTGAGE TRUSTEE IN THE BUCKEYE CO. LANDS, ARE NOT WELL-FOUNDED AND ARE ERRONEOUS.

The main decree in this case was entered March 14, 1914. The Government's petition to force the Railroad company to sell the Buckeye Coal Company stock was filed in October, 1915. The court entered an order requiring the sale of that capital stock in May, 1916. The stocks of the Buckeye Coal Company and the Ohio Land Company were sold under that order in October, 1916. No action was taken by the Hocking Valley Ry. Co. or its mortgage trustee to collect any two cents royalty until January, 1919, when the trustee filed suit in the Federal District court seeking to collect such royalty. Evidently the Buckeye Coal Company and its successor, the Sunday Creek Coal Company, relied on the position that the two cents royalty clause was illegal for the reasons hereinbefore stated, and did not pay any such royalty, and have not yet paid any.

Upon the trustee filing the suit to collect the royalty, The Buckeye Co. promptly filed in the Common Pleas Court of Perry County a suit to clear title of the asserted lien of the mortgage with its two cents royalty provision. When that litigation was completed in 1921, the Buckeye Coal Co. and its grantee, The Sunday Creek Co., promptly filed the present petition in this court in December, 1921.

There were then before the court in June, 1923, two petitions both asking that the Hocking Valley Ry. Co. and its mortgage trustee be required to part with or dispose of all interest they retained in the Buckeye Coal Co. lands and particularly to dispose of the 2c royalty

on coal mined from those lands. The court, however, denied and dismissed both petitions and its reasons for doing so are given in its opinion appearing in the record (p. 109).

The petitions set up substantially the same facts and we have heretofore in our statement of the case shown the principal matters alleged in those petitions. The prayers of both petitioners ask that all interest of the railroad company and its mortgage trustee in the coal lands be disposed of, but the prayers differ to some extent as to the manner in which it should be done. As the opinion of the court on these petitions errs in stating the taxpayers and we here reproduce them. The prayer of the Buckeye Co. is as follows (rec. 11):

“Wherefore your petitioners pray that proper orders may be entered in this cause, enjoining any demand or collection of said two cents per ton mentioned in said Section 9 of Article 2 of said mortgage, decreeing that all the lands of said Buckeye Company be released and eliminated from said mortgage and particularly from said Section 9 thereof, or that all interest or interests of said railway company and said trust company in said property *be sold* or such other and appropriate order herein as will effectively carry out the purpose and effect of the main decree entered herein.”

The prayer of the petition filed by the United States (rec. 71-2) asks the court to hold that the lien of the Hocking Valley mortgage and the 2c royalty provision therein give “an interest in and a domination and control over said Buckeye Company and its properties contrary to the decrees entered therein on March 14, 1914, and May 19, 1916,” and proceeds:

“That defendants, The Hocking Valley Railway Company and The Central Union Trust Company of New York, trustees, be required to release the above described coal lands from the lien of said Hocking Valley first consolidated mortgage, and to release

The Buckeye Coal & Railway Company from its obligations under Section 9 of said mortgage, upon payment by said Buckeye Company, or its successors in interest, to The Central Union Trust Company of the reasonable value of the rights of said trustee thus to be relinquished."

The prayer is also that the value of the interests of the Hocking Valley and its mortgage trustee in the coal lands be ascertained, etc., and

"6. That petitioner have such other and further relief as may to the court seem just."

It will be observed that the petition of the Buckeye Coal Company asks, in the alternative, among other things, that the interests of the railway company and its mortgage trustee may be sold or for such other order as will effectually carry out the main decree in the case. The opinion of January 18, 1924, (rec. 109) denying these two petitions states at the head of record page 113 that the difference between the two petitions "is that the one asks release of the property without, the other upon, compensation to the mortgage trustee." The mistake of the court in so stating the prayers of the petitions is apparent.

In passing, attention is called to the statement in the opinion (rec. 111) that when the Buckeye stock was sold in 1916, testimony of witnesses was taken in open court showing the reasonableness of the price paid. What that testimony showed and why the price was fixed at the sum indicated does not appear in this record.

The doubt expressed by the court in that opinion (rec. 113) as to a continuing jurisdiction of the court to force complete dissolution of the condemned combination appears unfounded and is not relied upon, probably in view of the earlier sentence in the same opinion (rec. 110) where the court says the jurisdiction of the cause was retained to force complete dissolution of the combi-

nation condemned. An earlier opinion in the same record (rec. 205) in a footnote also passed upon the claim that jurisdiction had been exhausted and held that complete jurisdiction remained.

The allegation of the opinion (rec. 113) that the sale of the Buckeye stock was approved with full knowledge of the situation is immaterial. There certainly was such knowledge, for the court in its order of October, 1916, approved the contract whereby the Hocking Valley Ry. disposed of its holdings in Buckeye Company stock to Jones, which expressly reserved the question of whether the covenants and obligations of the railway company's mortgage were binding upon the Buckeye Coal Co. when it is provided in the Fifth clause of that contract (rec. 60-1) that nothing therein "contained is intended or shall be construed in anywise to limit or affect or impair the several covenants or obligations of the Buckeye Company contained" in said mortgage. The court, therefore, probably knew and the parties certainly knew that that question was reserved.

The lower court was inconsistent in dismissing the present petitions. It provided in the main decree that no interest whatsoever in the coal lands should remain in the Hocking Valley Ry. Co. It refused to allow the sale of the Buckeye Coal Co. stock to Mr. Poston because part of the consideration to be paid by him was an income bond (not very different from a dividend or a royalty) secured upon the Buckeye property and to be given to the Hocking Valley Ry. Co. or its mortgage trustee, on the ground that by such income bond there would be retained an interest in the property for the benefit of the Hocking Valley Ry. Co. It forced the sale of the Buckeye Coal Co. capital stock to Jones after carefully examining Jones as to whether he had any railroad affilia-

tions. And yet the same court, in the order now complained of, dismissed two petitions, one by the party aggrieved and one by the United States (original complainant), which asked it to require the separation of the railroad company and its mortgage trustee from the very important interest in the lands of the Buckeye Coal Co., which that railroad and its mortgage trustee retain to this present day.

The Hocking Valley Ry. Co. and its mortgage trustee held two interests in the coal lands involved, one was by ownership of the capital stock of the Buckeye Co. which owned the lands, and the other because that coal company mortgaged its lands to the same mortgage trustee for the benefit of the same railroad company and agreed in the mortgage to pay a royalty on those lands. Probably the latter interest, the one now under discussion, was as important, was as great or greater a violation of the law and existed to the same extent in violation of the main decree in this case as did the ownership and mortgage of the capital stock of the company that owned that land.

Why does the Hocking Valley Ry. Co., oppose these petitions? Is its opposition not proof of the fact that the decree of March 14, 1914, has not been obeyed? Is it not because it seeks to retain a valuable interest in coal properties? Is not its attitude proof of the vice pointed out in the opinion at page 167 in the *Continental Co.*, case, *supra*, where it was said,—

“It is further questioned whether the interest which the new Coal Company, with its properties still subject to the lien of the general mortgage, will have in preserving the solvency of the Reading Company, would not create a constant motive on its part to favor the Reading Company with its tonnage and discriminate against other carriers reaching its mines. It is pointed out, too, that the interest of the

Reading Company in the continuing ability of the Coal Company to avoid default on its proposed mortgage for \$25,000,000 to secure bonds to be given to the Reading Company, would prompt a community of operation between the two companies which it was the object of this court to end."

Controlling Effect of the Decrees of the Federal Court Over the Decree of the State Court.

It is immaterial whether or not the Buckeye Coal Company did right in submitting to the state court, on its bill to quiet title, the question of freeing its land from the railroad incubus. It probably did not imagine that the state court would disregard the decree entered herein on March 14, 1914. The questions involved, the rights of the parties, had been settled by the Federal Court in that decree, which stood in full force and effect. It was founded upon a proceeding instituted by the United States in the interest of the public and to enforce the federal laws. That decree reserved jurisdiction in order to completely dissolve the illegal combination. Jurisdiction over all these matters ever since the filing of that suit by the United States has been the primary jurisdiction, and the orders and decrees made therein supersede any decision of any state court in a subsequent proceeding that arrives at any contrary conclusion, especially where the United States or the state of Ohio was not represented in those subsequent state court proceedings.

When the court pronounced this opinion on January 18, 1924, (rec. 109), it was acting in a suit that took precedence in time, parties and subject matter over the later proceeding in the state court and the federal court was so acting upon the petition not only of the Buckeye Coal & Ry. Co. but of the United States, original com-

plainant herein, a party who was not and could not have been made a party to the state court proceeding. Therefore, the jurisdiction of the federal court in passing upon the two petitions now involved, and in carrying out the decree of March 14, 1914, was above and beyond the action of the state court, even if the state court had had before it the same questions as are now before this court.

But the state court did not have the same questions before it. It was simply a suit between two citizens of Ohio to quiet title to land. No question of public policy was involved, no representative either of the United States or of the State of Ohio was present in that state court proceeding; no Sherman Anti-Trust law was before the state court or mentioned in its proceedings, and therefore, in the proceeding before the Federal Court when on January 18, 1924, it pronounced the opinion we are now considering, little or no weight should have been given to the state court proceedings.

If the state court was attempting to pass upon the same matters as are contained in the decree of March 14, 1914, if it was considering the same doctrines between the same parties, then it must have arrived at a conclusion different from the Federal Court decree and have declined to follow that decree and entered a judgment diametrically opposed to the decree of March 14, 1914, and the subsequent orders.

The Buckeye Company went into the state court relying upon the decree of March 14, 1914, and urged the state court to clear the title to its lands in conformity with that decree. If the state court refused in such a proceeding to recognize the validity of the decree of March 14, 1914, and arrived at some other conclusion, that conclusion is not binding upon the Federal Court.

Especially is this true as the two petitions before the court in June, 1923, are founded upon that decree of March 14, 1914, and only asked its enforcement and one of those petitions was presented by the United States. Certainly so far as the United States is concerned, so far as public policy is involved, so far as the enforcement of the Sherman Anti-Trust Act is in question, the state court could not adjudicate contrary to the decree of March 14, 1914.

That part of the opinion appearing in the lower half of record page 114, which speaks of the illegal interferences being reduced to a minimum is also a mistaken position of the court. An affidavit of Dukes (rec. 248) was introduced upon the final hearing of the two petitions in June, 1923. That affidavit shows that the Buckeye Coal Co. property amounts to over 11,000 acres of coal lands; that there then remained in it upwards of 18,000,000 tons of lump coal; that about one-eighth of such lands were acquired by said Buckeye Company after the mortgage was made in 1899; that the amount of coal mined from those lands since the Hocking Valley Ry. Co. was compelled to sell the stock of the Buckeye Coal Co. is 3,741,187 tons, and that no royalty has been paid thereon. These figures mean large amounts of royalty and a consequent great control by the Hocking Valley Ry. Co. of coal throughout that coal field.

In the opinion and decree of the lower court May 19, 1916, (rec. 208, foot note) the court in answering the suggestion that only the railroad's equity in the lands above the mortgage be sold said:

"We would have no confidence that a sale of the mere equity of the Hocking in these stocks and bonds would bring more than temporary independence. The purchaser could not free them from the overwhelming mortgage nor compel its foreclosure, but

the danger of foreclosure and the consequent wiping out of this equity would be constant."

Why then did the court, if it had no confidence in such a sale, leave with the railroad company and its mortgage trustee a heavy mortgage and a valuable royalty right in the lands. Or is it that the court then believed the sale of the stock of the Buckeye Coal Co. would carry with it or eliminate the mortgage lien and the royalty provision?

The Mortgage Lien and the Royalty Provision Constitute Heavy Burdens on the Buckeye Coal Company.

In relation to what the court says about a minimum of danger of the Buckeye Company's property being lost by foreclosure of the mortgage, it must be remembered that there is here a mortgage constituting a cloud on all the lands of the Buckeye Coal Co., rendering them unavailable for sale, and that the mortgage does not mature by its terms until 1999. Moreover, although the court says there is but a minimum of responsibility under the provisions we are discussing, a mortgage of \$20,000,000 now rests upon the lands of the Buckeye Coal Company, that mortgage although probably never to be enforced has the effect of wiping out the invested capital of the Buckeye Company under the income tax law, and leaving it without any property to be treated as invested capital in ascertaining the amount of taxable income. Therefore, the court is mistaken in intimating that this is an unimportant question.

Again in the opinion at the top of page 114, the court states that it would be inequitable to allow the Buckeye Company owners to "escape liability for a situation assumed by them, and, as we must find, then recognized as of binding force." This part of the opinion is not

well founded in any view. It may be that it is intended to relate to the contract of October 1916 under which Jones acquired the capital stock of the Buckeye Coal Co. We insist that Jones never recognized any liability of the Buckeye Coal Co. under the Hocking Valley Ry. mortgage. In the contract last referred to there is a recitation of certain things done, and among those recitations is one showing the making of the mortgage, but the recitation of making the mortgage does not affirm its validity. The mortgage was made, signed and recorded, but it is not necessarily valid. The Morgan scheme of reorganization in 1899 was promulgated and performed and under it the combination of railroad and coal properties was brought into being. A recitation of those facts or a recitation that the scheme of reorganization was made and signed would not be an admission that that combination was legal. Indeed the court in its decree of March 14, 1914, recites that certain things were done, and then declares those acts invalid and void. So Jones in signing a contract in which there were recitations of certain things done did not assume any liability therefor or acknowledge their validity.

In the opinion the court also intimates that it would be inequitable for Jones to avoid the effect of this mortgage. Where does any want of equity arise? It is the law of this case that the combination of 1899 was illegal and against public policy. The Buckeye Coal Co. was organized as part of that scheme and all its stock was issued for the coal lands and then turned over by the purchasing committee to the Hocking Valley Ry. Co., without any consideration so far as the record shows. Being in complete control of the Buckeye Company through holding that stock the act of signing the mortgage with the name of the Buckeye Coal Company was practically the act of the Hocking Valley Ry. Co., done in carrying out the illegal scheme of reorganization.

The purchasing committee at the foreclosure sale in 1899 bought railroad properties and coal properties. It transferred the railroad properties to the Hocking Valley Ry. Co., which latter company, so far as the record shows, paid nothing for such properties except issuing its capital stock and making a railroad mortgage. The same purchasing committee transferred the coal properties to the Buckeye Company, which latter company paid nothing for such properties other than issuing its capital stock and agreeing to be surety on the railroad mortgage. How then can it be said, on the contention of the Hocking Valley Ry. Co. and its mortgage trustee, that it is inequitable that the Buckeye Company should be free from the mortgage and from the royalty provision? The Hocking Valley Co. paid nothing for its property except the making of the mortgage. It was the purchasing committee that made deeds to both of these companies and the Hocking Valley concedes and has agreed that the Buckeye Co. is only surety and its mortgaged property should not be taken for the mortgage. Where then is there any want of equity in the position taken by the Buckeye Coal Co. or any hardship on the Hocking Valley Ry. Co.?

When, in 1916, the Buckeye Co. stock was sold in order to make a more complete separation between the railroad and coal properties, the purchaser, Jones, was justified in believing that by that sale the Hocking Valley Ry. Co. and its mortgage trustee parted with every particle of interest they had in the Buckeye Coal Co. lands. Did the court intend to separate the railway company from only part of its ownership and interest in the coal lands? Since that sale of the stock of the Buckeye Company in 1916, no royalty has been paid and the Buckeye Company has not acknowledged that the railway

company or its mortgage trustee has any interest in the coal company lands (rec. 248-9).

What then are the equities in this case? Is it equitable that, in defiance of the main decree in this case, the railway company or its mortgage trustee shall retain a very substantial interest in these coal lands—a royalty of one dollar a ton on over 18,000,000 tons of coal and a lien upon the lands themselves in favor of payment of the principal of the bond issue? Is it not much more equitable that the separation should be declared complete and that the Buckeye Company should hold its lands free from any interest therein of the railroad company or its mortgage trustee?

In presenting its case, counsel for the railroad company and its mortgage trustee insist on treating them as if they had done no wrong, as if their interests must be tenderly cared for in a court of equity as if they were the most innocent persons in the world, no punishment is to be meted out to them, nothing harsh is to be done to them, they must have everything that they could or would have had if the court had held that the illegal combination was legal and equitable. Jones had done nothing inequitable, but even if he had, yet in behalf of the public the separation must be carried out whoever may suffer.

In *East St. Louis v. Jarvis*, 92 Fed. 735, the Circuit Court of Appeals in speaking of an illegal and unauthorized control of competing lines of railroad said:

“The objection to the contract is not merely the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it.”

In *McMullen v. Hoffman*, 174 U. S. 639, in speaking of a contract against public policy, the court said:

"Contracts of the nature of this one are illegal in their nature and tendency, and for that reason no inquiry is necessary as to the particular effect of any one contract, because it would not alter the general nature of contracts of this description or the force of the public policy which condemns them." (p. 649).

"The court refuses to enforce such a contract and it permits defendant to set up its illegality, not out of any regard for the defendant who sets it up, but only on account of the public interest. * * * The more plainly parties understand that when they enter into contracts of this nature they place themselves outside the protection of the law, so far as that protection consists in aiding them to enforce such contracts, the less inclined will they be to enter into them. In that way the public secures the benefit of a rigid adherence to the law." (p. 669).

Plainly in this case the offense against public policy consists in entering into the railroad and coal combination in 1899. A mortgage forming part of the combination ought not to be enforced. Jones, the present owner of the Buckeye Company, was not in that combination. He was not in *pari delicto* with the reorganization committee or any of its creatures. In 13 C. J. 489 it is said:

"The same is held where the complaining party has entered into the illegal contract through the duress of undue influence of the other. If one party is but an instrument in the hands of the other, then they are not in *pari delicto*. If the mind of one of the participants in the transaction exercises an undue influence over that of the other, whether by imposition or threat on the one side and confidence or weakness on the other, equity will grant relief to the latter."

The result of the opinion of the lower court now complained of (rec. 109) is that the illegal combination of 1899 suffers no harm or punishment. The Hocking Val-

ley Ry. Co. is permitted to retain a very valuable interest in coal lands, to collect a 2c royalty on over 18,000,000 tons of coal. The combination of railroad and coal properties so vigorously denounced by the lower court in 1914, now receives the sanction of the same court. The manner of effecting a separation of railroad and coal interests pointed out in *Continental Co. v. United States*, 259 U. S. 156, is ignored in large matters. The purchasers of the Buckeye Co. capital stock under orders of the lower court are ill-treated. Under the opinion as it now stands the principles and practice approved in the *Continental Co.* case are departed from. That opinion by this court is departed from and avoided. A violation of the decree of March 14, 1914, is condoned and encouraged. The petitions both of the Buckeye Coal Co. and of the United States are denied, and the interests of the public are left to care for themselves in the best manner they can.

In the record (rec. p. 247) appears a stipulation submitted at the hearing, signed by the railway company and its mortgage trustee and by the United States. The Buckeye Co. and the Sunday Creek Co. refused to sign the stipulation and, therefore, that stipulation, although appearing in the record, can have no bearing on this appeal. We call attention, however, to the fact that the United States, petitioner, refused (p. 248) to accede to the claim of the Hocking Valley Co. that the coal company stock was sold for \$50,000 on account of the \$20,000,000 mortgage. The court in 1916 found that \$50,000 was a fair value for the Buckeye Coal Co. capital stock, but how much influence the Hocking Valley Company mortgage had upon that value is not shown. Nor is it shown what other elements entered into the value of the stock as so found. Such value may have been effected by long term leases and low royalties without minimums and

various other matters which do not appear. It is sufficient to say that the Buckeye Co. refused to agree to the stipulation at all and the United States refused to admit how the value of the Buckeye stock may have been ascertained.

In the foreclosure litigation that led up to the reorganization of 1899 several questions were presented for consideration to Mr. Justice Lurton then circuit judge. His opinion thereon appears in 87 Fed. 815, and also at page 222 in the present record. The questions discussed by him do not involve public policy, or the illegality of a combine, or the stifling of competition; they relate entirely to the doctrine of *ultra vires* as between two corporations. In the opinion (rec. p. 225) it is said "The question of *ultra vires* is that upon which the decision must turn."

Considered as limited to the question stated by Judge Lurton, the opinion has no bearing on the questions involved in this case. But if it is to be taken as justifying in any way a combination between railroad and coal companies or as validating a mortgage made by them when considered under the Sherman Anti-trust Act, then we submit that it is in direct conflict with the leading opinion and decree in this case and with the principles laid down in *Continental Co. v. United States*, 259 U. S. 156.

We, therefore, respectfully urge that this case be sent back to the lower court with instructions to bring about a complete separation of the railway and coal interests here involved and with instructions as to how that separation can best be effected under the prayers of one or both of the petitions now before the court.

WILLIAM BURRY,
W. O. HENDERSON,
Solicitors for Appellants.

March, 1925.

APR 20 1925

WM. R. STANBURY

IN THE
Supreme Court of the United States.

OCTOBER TERM, ~~1924~~ 1925

No. ~~3000~~ 51

THE BUCKEYE COAL AND RAILWAY COMPANY,

ET AL.,

Appellants,

vs.

THE HOCKING VALLEY RAILWAY COMPANY, CENTRAL UNION TRUST COMPANY OF NEW YORK, UNITED STATES OF AMERICA, ET AL.,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF OHIO.

BRIEF OF APPELLANTS AGAINST MOTION OF APPELLEES
TO DISMISS APPEAL.

WILLIAM BURRY,

WILLIAM O. HENDERSON,

Counsel for Appellants.

April, 1925.



IN THE
Supreme Court of the United States.

OCTOBER TERM, 1924.

No. 368

THE BUCKEYE COAL AND RAILWAY COMPANY,

ET AL.,

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Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
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**BRIEF OF APPELLANTS AGAINST MOTION OF
APPELLEES TO DISMISS APPEAL.**

The motion and accompanying brief are founded on the theory that, although appellants had a right to intervene and file their petition herein and the court had a right to pass finally on the petition, yet appellants had no right to appeal from that decision.

No technical grounds are alleged for the motion, no objection is made to the manner in which the appeal was taken, and the motion seems to deal with the merits of the case. It does not appear exactly how appellees, while conceding the propriety of the intervening petition and insisting upon the decision and judgment rendered thereon, still insist that there is no right to appeal although the statute expressly allows such an appeal.

I.

Appellees at no time and in no way objected in the court below to appellants filing the intervening petition. They answered it on the merits and it is now too late to move to dismiss the appeal either because of the manner of such intervention or on account of an erroneous assumption that interveners were seeking to act on behalf of the public.

Appellees do not now object to the intervention, their objection being simply to the appeal because, as they say, appellants "are without standing to prosecute an appeal" (Brief, p. 1). Appellants presented to the court below their intervening petition with their prayer for leave to file the same, and upon examination the court ordered it to be filed. It was then filed. The court also ordered appellees and the United States District Attorney to answer the petition. (Rec., 11-12). The movers answered the petition without any objection to the intervention (Rec., 12, 27). The United States, plaintiff in the original action, neither answered the petition nor objected to the intervention. Appellees answered the petition to the merits.

On June 5, 1922, appellants' petition was argued and submitted to the court upon the petition and the answers of the movers and still without any objection to the intervention (Rec., 62). And appellees, and also the United States, have never at any time or in any way objected to the propriety of the intervention or to the filing of appellants' petition.

It must be presumed that the trial court, upon examination of appellants' petition, found good and sufficient ground for it, as otherwise the court would not have al-

allowed the petition to be filed. No abuse of discretion of the court below in allowing and ordering the intervention is alleged. Until clear abuse of such discretion is shown, we take it this court will not hold that the action of the trial court was unauthorized, illegal or improper.

It is not altogether clear upon the present record that the appellant, the Buckeye Coal & Railway Company, was a party to the original action, when it, with its co-intervener, intervened by their petition filed December 6, 1921 (Rec., 7). The fair inference from the present record is that it was such a party. It was not one of the original parties (Rec., 117). But many parties were made to the original action after it was begun, the addition of some of whom are shown by the present record, including appellee, the Central Union Trust Company (Rec., 194).

It is a fair inference from facts appearing in the record that the Buckeye Company was a party to the original action before the intervention. It is named or referred to in the original opinion and decree of the court below as one of the coal companies whose stock was owned and which was dominated by the Hocking Valley Railway Company (Rec., 121, 124, 171); as having joined with the Hocking Valley Company in the first consolidated mortgage which contains the royalty provision, the main subject matter of the present litigation (Rec., 129, 171, 173), and as a company leased by the Sunday Creek Company, an original defendant (Rec. 178). It is mentioned in the opinion of the court below of July 30, 1915, in the petition of the Hocking Valley Company to approve the sale of its stock and other stocks and bonds (Rec., 184, 188). It is mentioned in the petition of the United States, filed Oct. 9, 1915, to require the sale of certain stocks and bonds owned by the Hocking Valley Company and another railway company, in order to

effectuate the original decree to wholly divorce the railway companies from all interests, direct or indirect, in any of the coal properties in which the Sunday Creek Company was interested, as one whose properties were controlled by the Sunday Creek Company under lease (Rec., 189, 190), and as one whose stock was owned by the Hocking Valley Company and pledged to the Central Union Trust Company (Rec., 191). It is mentioned in the answers of the Hocking Company and the Trust Company to that petition (Rec., 192, 194, 195, 196, 199). It is also named in the order entered May 19, 1916, upon that petition and the answers (Rec., 201, 202, 203, 204, 205, 206, 207). And it is also mentioned in the petition and motion of the Hocking Valley Company and in the order entered thereon by which the stock of the Buckeye Company, together with other stock, was sold with the approval of the court to John S. Jones (Rec., 209, 210, 211, 212).

The property of the Buckeye Company was certainly involved in this suit from the beginning. A description of the formation of the company and where its property came from appears in the main opinion in this case (Rec., 124). When the United States filed a supplemental petition in October 1915, (Rec., 189) its property and stock were described and complainant prayed that the stock be sold. The Buckeye Company and its property are described in the main opinion announced herein on March 14, 1914. From the very beginning and up till the present date the property of the Buckeye Company has been involved in this litigation and orders have been made concerning it and concerning its capital stock.

The other appellant, the Sunday Creek Coal Company, is a new company incorporated in April, 1919, and was not a party to the original action (Rec., 249, 251), but it

succeeds to the Sunday Creek Company, which was an original defendant.

But whether the Buckeye Company was or was not a party to the original action before the present intervening petition, is an unimportant question, in view of the fact that the intervention was made and allowed under the provisions of Equity Rule 37, then in force, which provides:

"Anyone claiming an interest in the litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding."

The intervention complied fully with the condition of the latter clause of that provision in that it was entirely in subordination to, and in recognition of, the propriety of the main proceeding. The prayer of the present petition is for specific relief sought by the petitioners in their own interest, which relief was entirely in subordination to, and in recognition of, the propriety of the main proceeding, and is also "for such other and appropriate order therein as will effectively carry out the purpose and effect of the main decree entered herein" (Rec., 11). So that, when the court below passed upon appellants' petition as one entitling them to intervene and allowed the petition to be filed, the status of appellants as parties to the action below with all the rights and privileges of the other parties to that action, including the right of appeal, became fixed. That action being one under the Expedition Act of Feb. 11, 1903 (Rec., 1), appellants required the right of direct appeal to this court. Their appeal has rightfully and properly been taken and perfected.

Petition of the United States.

The United States without answering the petition of appellants, on November 21, 1922, after the submission of appellants' petition but before decision, filed by leave of the court its supplemental petition (Rec., 62, 72). Afterwards, on January 27, 1923, the court ordered appellants and appellees (except the United States) to answer that supplemental petition (Rec., 72). It was so answered (Rec., 73, 77, 93). That supplemental petition was argued and submitted June 8, 1923 (Rec., 109), and the court then had both petitions under advisement.

Both cases were decided by the same opinion and judgment (Rec., 109, 115).

Appellants duly appealed from the judgment against them for the errors assigned (Rec., 17). The United States did not appeal from the judgment against it.

The "proceedings" in the State Courts referred to were not begun till April 21, 1919 (Rec., 25, 41), long after the Federal Court had acquired jurisdiction of appellees, appellants and the subject matter of the original action, which prior jurisdiction the Federal Court still holds over and against the subsequent jurisdiction of the State Courts. The decision of the State Courts in such "proceedings" does not bar or disturb the jurisdiction and authority of the Federal Court in carrying out the purpose and intent of the original decree in the original action.

The case of *United States v. Northern Sec. Co. et al.*, 128 Fed., 808, cited by opposing counsel at pp. 9 and 12 of their brief, was heard and decided by the trial court upon the application to intervene, and particularly not after the intervening petition had been presented to the

lower court on an application for leave to file it and had been examined by that court and ordered filed and the defendants thereto ruled to answer it; and still further particularly not after the intervening petition had been answered and decided on the merits. Opposing counsel conveniently omit from the extract quoted by them from the opinion in the case cited that significant part of it wherein the court said: "We consider and determine this application upon the petition for leave to intervene alone." This means that the petition must itself show sufficient cause for intervention before leave to file the same will be granted. Therefore, if such a petition, with prayer for leave to file the same, is presented to and examined by the trial court and that court orders it filed and orders the defendants thereto to answer the same, it is conclusive on an appellate court that good and sufficient cause was shown for filing the petition,—certainly so until it is clearly shown that the order granting the intervention was an abuse of discretion.

Appellees do not question the action of the court below in allowing the intervening petition to be filed and in finally passing upon its merits. They do not question the jurisdiction of that court nor the finality of its judgment. They rely on that judgment and will hereafter claim it as *res judicata*. How then can they now insist that that judgment of the District Court cannot be reviewed? As appellees concede our right to make the present intervention and to obtain a final decision thereon, why should they deny our right to this appeal from that decision?

For the foregoing reasons the motion should be overruled.

II.

Appellants intervened chiefly because of their own important financial interest and only incidentally as informers as to the public interest. It is not true that they intervened "solely as informers to call attention to an alleged public interest" and "acquired no status as litigants." They however rely upon the main decree, entered March 14, 1914.

Opposing counsel erroneously assume and repeat that appellants intervened solely to protect an alleged public interest. Nor is it true, as stated by counsel (p. 9) that "Appellants' pleadings, expressly admit their private controversy with the appellees was previously disposed of in proceedings in the Ohio State Courts." And that is not otherwise admitted. The proceedings in the State Courts and their decisions are shown and admitted, but these do not "*dispose of*" appellants' "private controversy with the appellees," except so far as such decisions may rightfully go. Those proceedings did not "dispose of" any controversy then pending in the Federal Court and within its jurisdiction.

The Federal District Court in Ohio acquired and held first, prior and continuing jurisdiction over all the parties and over the subject matter of the "private controversy" and of all controversies within the subject matter of the original suit in which the intervention was made. The opinion of that Federal Court was rendered December 28, 1912, and its decree was entered March 14, 1914 (erroneously printed at page 109 "1924") (Rec., 109, 165, 183), long before the jurisdiction of the State Courts was invoked. Federal jurisdiction was acquired when the original bill in equity was filed in the Federal

Court. Jurisdiction of the subject matter of the original suit was expressly reserved by the Federal Court at the end of its decree in these words:

“(8) That jurisdiction of this cause be retained by this court for the purpose of making such other and further orders and decrees as may be necessary to the due execution of this decree and the complete dissolution of the combination and monopoly herein condemned.”

The Federal Court, in its note on the margin of its supplementary order of May 19, 1916, to enforce the carrying out of its main decree, said (Rec., 206):

“The jurisdiction retained was for the purpose of making not only such further orders and decrees as might be necessary to the due execution of the decree, but also to the complete dissolution of the combination and monopoly therein condemned. It certainly cannot be successfully denied that jurisdiction of such a case as this may and ought to be retained until the decree is fully and effectively enforced, and the condemned monopoly and combination completely dissolved.”

And that court, in its opinion of June 30, 1915 (mistakenly printed at p. 183 “1914”), on the petition of the Hocking Valley Company to approve the sale of certain stocks and bonds, said (Rec., 184, 8, 190):

“We cannot too often repeat that the prime purpose of our decree was to insure the complete separation of the railroad interests from the coal mining interests, so that the former should not and could not dominate the latter.”

The title of appellants' petition was this:

“Petition concerning the interest retained by the Hocking Valley Railway Company and the Central Union Trust Company as trustee, in the coal lands of the Buckeye Coal and Railway Company.”

and the body of the petition presented fully that subject.

Appellant, the Buckeye Coal and Railway Company, is the same Buckeye Company which joined in the first

consolidated mortgage of the Hocking Valley Railway to secure the latter's bonds, the Buckeye Company thereby mortgaging its properties to further secure the Hocking Company's own railroad bonds, which bonds the Buckeye Company did not sign or otherwise obligate itself upon. This mortgage contains the two cents royalty provision about to be referred to, which is the principal basis of the present litigation.

Appellees' Motion and Brief in Support Thereof involve the Merits.

The present motion is one involving the merits of the case and to properly consider it would require an examination of the record, a statement of facts and many references to the record. That this is so is shown by the fact that the brief in support of appellees' motion to dismiss is made up largely of quotations from the opinion and decree from which we are appealing. Indeed, on page 2 of the motion and brief, appellees state:

"The material facts are succinctly stated in the opinion of the court below filed January 18, 1924." and thereupon the opinion is largely set forth.

It is expected that this case will soon be reached for hearing on the merits, and therefore appellants have already filed their brief on the merits, and that brief contains on the first sixteen pages thereof our statement of the case, of the material facts and the positions taken by both parties. Instead of now cumbering this brief with a restatement of the case we respectfully refer the court to the statement of the case as set out in our main brief.

For their statement of the case appellees refer, as above said, to the opinion in the case. In our main brief we comment on that opinion, show its inaccuracies and ask for its reversal. In thus seeking to found their mo-

tion on an opinion from which we have appealed and which we have criticized to the best of our ability in our main brief, it becomes clear that this is a motion to dismiss on the merits.

In passing we will say that our petition refers to the main decree in this case of March 14, 1914, sets out its provisions, refers to the reorganization in 1899, the making of the twenty million dollar mortgage, the clause by which the Railway Company retained the two cent per ton royalty on the coal belonging to the Railway Company and to other matters connected therewith. The answers thereto of the Hocking Valley Railroad Company and the Central Union Trust Company cover thirty pages of the record (Rec., 12-42) and the reply to those answers with four exhibits covers twenty pages of the record (42-62). We cannot make a synopsis of these pleadings shorter than the statement of the case contained in our main brief.

There is also set out in the petition, answers and reply the passing of the control of the Buckeye Company from the Railway Company to Jones in 1916, the position taken by the Buckeye Company thereafter on these questions, and certain proceedings in the State Court, all of which must be taken into consideration on this motion to dismiss.

The amount now in controversy, arising from the two cent royalty provision and now at issue between appellees and appellants is not set out in the present record, but it does appear that 3,741,189 tons of coal have been mined during the period of this dispute and no royalty paid thereon, which would amount to about \$75,000, and it also appears from the affidavit of Duke (Rec., 109) that about eighteen million tons of mineable and recoverable

coal remain in the ground, which would involve the further sum of about \$360,000.

Thus it is conclusively shown that it is not true that appellants have no personal financial interest to be protected by their petition, or that they have no private controversy with appellees, or that their private interests were disposed of by the Ohio courts, or that appellants have "intervened solely as informers to call attention to an alleged public interest." While a public interest may be involved and while there may be involved in this case questions concerning the unenforceability of contracts against public policy, yet it is true that appellants have a large personal and private interest in the matter in controversy and that any attempt to put appellants in the position of simply trying to enforce a public right is entirely baseless.

For these reasons also the present motion should be overruled.

III.

Appellants have not usurped or attempted to usurp the functions of the United States, the District Attorney or the Attorney General.

It is not true, as stated by opposing counsel (Brief, p. 10) that appellants were permitted to file their petition "for the sole purpose of calling the court's attention to the alleged violation of, or failure to conform to, the terms of the final decree or to subsequent orders or decrees made in furtherance of that decree." The petition, answers and reply are general, unlimited and unconditional in character, except only so far as they may have been limited by their terms. The issues made by the present pleadings are broad in character and present the

whole subject matter of the interest in the coal lands retained by the Railway Company and the Trust Company. The United States, original complainant, has never objected to the intervention or suggested in any way that appellees were usurping or attempting to usurp its functions. The claim of opposing counsel in this respect is conclusively negatived by the attitude taken and continued by the United States (Rec., 74).

Respectfully submitted,

WILLIAM BURRY,

WILLIAM O. HENDERSON,

Counsel for Appellants.

April, 1925.



POSTED TO MERITS
APR 27 1925

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WM. R. STANLEY

4
IN THE

Supreme Court of the United States

OCTOBER TERM, 1924
1925

No. 368
51

THE BUCKEYE COAL AND RAILWAY COMPANY and
THE SUNDAY CREEK COAL COMPANY,
Appellants,

vs.

THE HOCKING VALLEY RAILWAY COMPANY, CEN-
TRAL UNION TRUST COMPANY OF NEW YORK
and THE UNITED STATES OF AMERICA,
Appellees.

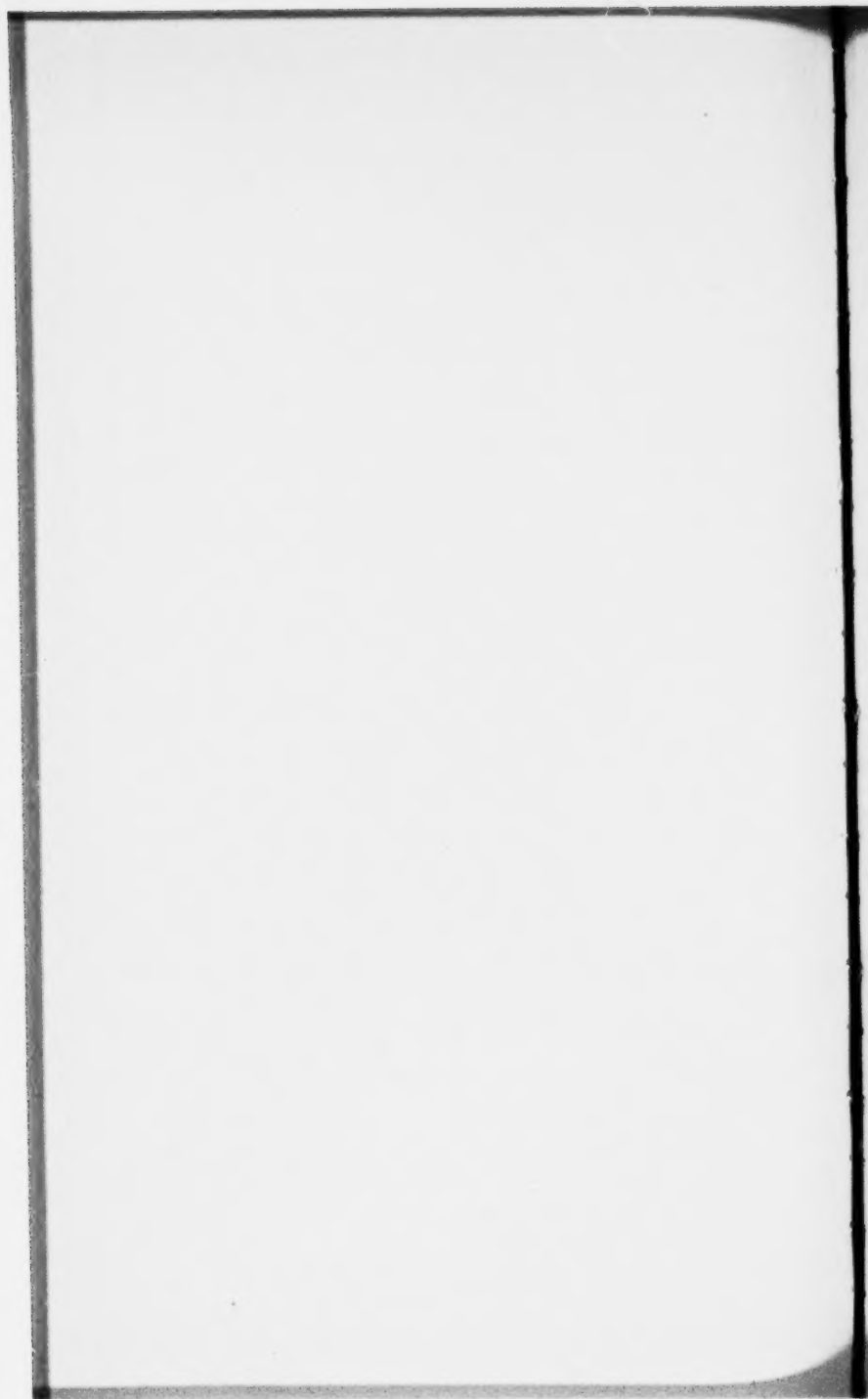
APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION.

MOTION BY APPELLEES, THE HOCKING VALLEY
RAILWAY COMPANY AND CENTRAL UNION TRUST
COMPANY OF NEW YORK, TO DISMISS APPEAL.

ARTHUR H. VAN BRUNT,
*Solicitor for Appellee, Central Union
Trust Company of New York.*

JOHN F. WILSON,
*Solicitor for Appellee, The Hocking
Valley Railway Company.*

ARTHUR H. VAN BRUNT,
JOHN F. WILSON,
A. C. REARICK,
PAUL SMITH,
of Counsel.



IN THE
Supreme Court of the United States

OCTOBER TERM, 1924.

No. 368.

THE BUCKEYE COAL AND RAILWAY COMPANY and
THE SUNDAY CREEK COAL COMPANY,
Appellants,

vs.

THE HOCKING VALLEY RAILWAY COMPANY, CENTRAL
UNION TRUST COMPANY OF NEW YORK, and UNITED
STATES OF AMERICA,

Appellees.

**Appeal From the District Court of the United States for
the Southern District of Ohio, Eastern Division.**

**MOTION BY APPELLEES, THE HOCKING VALLEY
RAILWAY COMPANY AND CENTRAL UNION
TRUST COMPANY OF NEW YORK, TO DIS-
MISS APPEAL.**

Come now the appellees, The Hocking Valley Railway Company and Central Union Trust Company of New York, Trustee, and move to dismiss the appeal herein on the ground that it appears upon the face of the record that the appellants are without standing to prosecute an appeal to this Court.

STATEMENT.

The present appeal is taken by appellants from an order of the United States District Court for the Southern District of Ohio, Eastern Division, dismissing a petition filed by appellants by leave of said Court in a proceeding theretofore pending in said Court under the title *United States of America v. Lake Shore & Michigan Southern Railway Company, et al.*, In Equity, No. 1584. The material facts are succinctly stated in the opinion of the Court below, filed January 18, 1924 (R., 109-113):

"In the year 1912 the United States began suit in equity herein against six railroad companies and three coal companies, named in the margin hereof,¹ to dissolve a combination alleged to violate the Sherman anti-trust act (July 2, 1890, c. 647, 26 Stat. 209). Our decree of March 14, 1914, declared the combination to be in violation of the Act, and ordered dissolution by the sale of the railway companies' interests in the stock of the Sunday Creek Company, the disposition of stock in the Kanawha & Michigan Railway Company, and otherwise, including the enjoining of the Lake Shore & Michigan Southern, the Toledo & Ohio Central, the Hocking Valley and the Chesapeake & Ohio Railroad Companies from owning or controlling any stock in the Sunday Creek Company, or any interest in any of the coal properties in which that company is interested. Jurisdiction of the cause was expressly retained by the decree for the purpose of making such other and further orders and decrees as might be neces-

¹ The Lake Shore & Michigan Southern Railway Company, the Chesapeake & Ohio Railway Company, the Hocking Valley Railway Company, the Toledo & Ohio Central Railway Company, the Kanawha & Michigan Railway Company, the Zanesville & Western Railway Company, The Sunday Creek Company, the Continental Coal Company, the Kanawha & Hocking Coal & Coke Company.

sary to the due execution of the decree of 1914, and the complete dissolution of the combination condemned thereby. A detailed history of the case will be found in the opinion of this court upon which that decree was based. *United States v. L. S. & M. S. Ry. Co., et al.*, 203 Fed. 295. Under that retention, orders have been made from time to time, as deemed necessary, to effectuate dissolution.

"When that decree was made the Hocking Valley Railway Company owned the entire of the capital stock of the Buckeye Coal & Railway Company (consisting of 2500 shares), all of which except five qualifying shares were held in pledge by the Central Trust Company, as trustee under the Hocking Valley Railway Company's First Consolidated Mortgage of 1899, by which mortgage the Buckeye Company had conveyed certain coal lands as further security for the payment of the Hocking Valley Railway Company's bonds secured by that mortgage, by the terms of which the Buckeye Company agreed to deliver, beginning July 1, 1900, yearly statements of coal mined, and to pay two cents per ton on such coal, to be used as a sinking fund for the purchase and cancellation to that extent of the mortgage bonds of the Hocking Valley Company.

"On May 19, 1916, upon application of the United States, this court made an order that the capital stock of the Buckeye Company be sold free and clear of the mortgage lien, and that the proceeds thereof be paid to the mortgage trustee to apply on the mortgage bonds (281 Fed. 1007). Under that order the Buckeye Company stock was sold to John S. Jones for \$50,000 (in connection with the sale to him of the outstanding stock and bonds of the Ohio Land & Railway Company for \$400,000), the sale being approved by this court upon presentation of the contract of sale between Jones, on the one part, and the Hocking Valley and Chesapeake & Ohio Railway Companies, on the other, and after taking the testimony of witnesses in open court relating to conformity of such

sale to the order of May 19, 1916, the reasonableness of the price paid, and the satisfactory status of the purchaser,—the mortgage trustee in connection therewith waiving its then pending appeal to the Supreme Court from the order of May 19, 1916. The contract between Jones and the railroad companies contained a recital of the inclusion in the Hocking Valley mortgage of the Buckeye real estate as such further security for the payment of the mortgage bonds, as well as the agreement in the mortgage for the payment by the Buckeye Company of the two cents per ton royalty on coal mined from its property so mortgaged. This recital was followed by express provision that the Hocking Valley Company should cause all the mortgaged property of that company to be first exhausted before any recourse under the mortgage to the property of the Buckeye Company; and that the Hocking Valley Company indemnify the Buckeye Company from any loss or damage to or payment by that company under the provisions of the mortgage 'save only said two cents per ton royalty above mentioned', and that nothing contained in said agreement was intended or should be construed in any-wise to limit, or affect or impair, the several covenants or obligations of the Buckeye Coal & Railway Company contained in said mortgage.

"After the purchase by Jones (who owned and owns all the Buckeye stock), the Buckeye Company failed and refused to carry out the provision for royalty payment. The mortgage trustee began suit in this court, in the year 1919, for the collection thereof, which suit is still pending and undetermined. In the same year the Buckeye Company instituted suit in a state common pleas court of Ohio to quiet its title against the claims of the mortgage trustee under the Hocking Valley mortgage. The Sunday Creek Coal Company of Ohio (not the original Sunday Creek Company), which had succeeded to the rights of the Buckeye Company in the lands, was made a party plaintiff. Upon final hearing upon issues joined, the Com-

mon Pleas Court dismissed the petition, adjudging that the mortgage 'and the covenants of the Buckeye Coal & Railway Company therein contained, are valid and binding obligations, and a good and valid lien upon the real property in said mortgage . . . described.' This decree was affirmed by the State Court of Appeals, the Supreme Court of Ohio declining to order the case certified for its review. Thereupon the Buckeye Company and the Sunday Creek Coal Company filed their petitions in this Court, asserting that the situation created by the Hocking Valley trust mortgage, including especially the two cents per ton royalty provision, was in violation of the decree of dissolution previously made by this court; and asking that the demand or collection of the two cents per ton royalty be enjoined, the lands of the Buckeye Company released from the mortgage, and particularly from section 9 thereof (which contains the royalty provision), or that all interests of the railway company and the mortgage trustee in the Buckeye property be sold, or such other and appropriate order as will 'effectively carry out the purpose and effect' of the decree of 1914. After issues joined on the petition, and before decision thereon, the United States filed its supplemental petition herein, asking that the Buckeye coal lands be released from the lien of the Hocking Valley mortgage and the Buckeye Company discharged from its obligation to pay the two cents per ton royalty, upon payment by the Buckeye Company, or its successors in interest, to the Hocking Valley's mortgage trustee the reasonable value of the rights of the trustee, to be judicially ascertained; and on the ground that the situation created by such lien and royalty provision violates the anti-trust act and contravenes the original decree of dissolution made herein. It will be observed that the substantial difference between the petitions of the coal companies and the Government, respectively, is that the one asks such release without, the other upon, compensation to the mortgage trustee."

Matters of evidence referred to in the foregoing statements of facts appear in the record herein as follows:

Final Decree of March 14, 1914 (R., 165).

Material portions of First Consolidated Mortgage, March 1, 1899, The Hocking Valley Railway Company and The Buckeye Coal and Railway Company to Central Trust Company of New York, Trustee (R., 215-220).

Order of May 19, 1916, directing sale of capital stock of The Buckeye Coal and Railway Company (R., 201-209).

Contract, October 7, 1916, for sale of The Buckeye Coal and Railway Company stock to John S. Jones (R., 57-62).

Order approving sale under contract of October 7, 1916, and order directing entry thereof (R., 212-213).

Admission of non-payment of royalties (R., 45).

Upon the foregoing facts the Court below reached conclusions which were clearly and concisely stated in the opinion of the Court as follows (R., 113-115):

“So far as concerns the petition of the Buckeye Company and the Sunday Creek Company, we think it clear that relief should be denied. While our jurisdiction generally to make such further orders and decrees as should be necessary to the due execution of our main decree, and the complete dissolution of the condemned combination, continued without abatement until such complete dissolution should be effected (*United States v. L. S. & M. S. Ry. Co. et al., supra*), there is perhaps substantial force in the thought that the order of this court of May 19, 1916, and the sale of the Buckeye Company's stock thereunder, exhausted the jurisdiction of this court over the specific question whether the situation created by the lien of the Hocking Valley mortgage upon the Buckeye Company's lands, given to secure the

Railroad's indebtedness, in connection with the tonnage royalty provision, was so far unlawful as to require its elimination. This court approved the sale of the stock to Jones with full knowledge of the fact situation now complained of, and presumably without its occurring to either court or Government's counsel that the situation created a substantial interference with the free competition aimed at by the original decree. The action taken might not improperly be thought to carry a tacit implication that the situation here presented was not then regarded open to criticism. But wholly apart from this consideration, and without passing upon its merits, we think relief forbidden by these further considerations: In the first place, assuming for the purposes of this opinion, that the petitioning coal companies have a legal interest in the elimination of the alleged unlawful feature, we see no reason to doubt that, as between the two original petitioners and the Hocking Valley Company and its mortgage trustee, the decree of the state court binds both the Buckeye Company and the Sunday Creek Company as an adjudication of the complete validity of the mortgage as against the attacks now made upon it. Again, this is a proceeding in equity, and it is manifestly inequitable that either Jones or those standing in his right escape liability for a situation assumed by them, and, as we must find, then recognized as of binding force, and whose assumption seems fairly to have been part of the consideration paid by Jones for the Buckeye stock. In the situation presented, we think the petitioning coal companies cannot be heard to say that payment of the royalty, or the continuance of the mortgage lien upon the lands of the Buckeye Company, would violate the law. The fact that the Government did not answer or take issue upon the coal companies' petition cannot alter the result otherwise reached. The petition of the coal companies must be denied.

"The Government's supplemental petition rests upon a different foundation. It is conceded that the decision of the Supreme Court in the Reading

case (*Continental Coal Co. v. United States*, 259 U. S. 156), announced about six years after the sale to Jones of the Buckeye stock, and shortly before the filing of the Government's supplemental petition before us, suggested to Government's counsel the invalidity of the situation we are considering. It was eminently proper that the Government bring this situation before the Court, and afford opportunity for such action, if any, as should seem to be called for. But we are not impressed that the situation calls for the relief asked. Again passing without decision the question of the exhausting of jurisdiction of this court over the subject-matter of the supplemental petition, by the action had in the sale to Jones, it seems plain that even in view of the Reading decision the criticized situation is not so clearly improper, nor so substantial, as to justify the action which the Government now asks. Whatever theoretically potential interference with free competition might otherwise be created by the railroad-mortgage lien upon the Buckeye lands in connection with the royalty tonnage provision, we think such interference practically reduced to a minimum by the fact that by the contract between Jones and the railroad companies the railroad property must first be exhausted before resort can be had to the coal lands, in connection with the fact that no suggestion is made that the railroad property is not entirely adequate to meet the payment of the mortgage in full, and the payment of the mortgage puts an end to the royalty. Indeed, an affirmative inference, more or less strong, in favor of the adequacy of the railroad security seems fairly deducible from the record presented to us. We therefore think that it will be time enough to question the invalidity of the situation we are discussing when, if ever, it becomes acute.

"We are accordingly constrained to dismiss the Government's supplemental petition. The dismissal, however, will be without prejudice to its right to make further application for relief, when, if ever, the situation may be thought to justify it, in view of the considerations we have stated."

ARGUMENT.

I.

The Appellants, Having Intervened Solely as Informers to Call Attention to an Alleged Public Interest, Acquired No Status as Litigants.

The appellants sought to file their petition solely to protect an alleged public interest and in order to "effectively carry out the purpose and effect of the main decree" (Appellants' petition, R., 7-11, Appellants' reply, R., 44-45). The appellants' pleadings expressly admit that their private controversy with the appellees was previously disposed of in proceedings in the Ohio State Courts (R., 11, 44). Their application to intervene might therefore have been denied by the Court below on the authority of *United States v. Northern Securities Company, et al.*, 128 Fed. 808, where the Court said:

"The application for leave to intervene contains the further suggestion, made on information and belief only, that the proposed plan of disposing of the stock of the Northern Pacific and Great Northern Railways Companies would result in leaving the control of the two railroads in the hands of persons who cooperated in forming the Securities Company, and that the petitioners should be permitted to intervene and obtain further order to prevent such a result. . . . The United States is the complainant in this case. It is the conservator of the public welfare and has a right to speak for the public. According to well established rules, the petitioners cannot intrude into this litigation merely to protect the public interest or as *amici curiae* so long as the Govern-

ment is present by its Attorney General and expresses its disapproval of such intrusion. This would be wresting from the Government that control over the litigation, so far as the public is concerned, which it has a right to exercise. The petitioners can intervene only for the protection of their own individual interests, and for that purpose only in the event that they can obtain adequate protection in no other way."

They were, however, permitted to intervene in the anti-trust suit but for the sole purpose of calling the Court's attention to alleged violations of, or failure to conform to, the terms of its final decree or of subsequent orders or decrees made in furtherance of that decree. Their capacity was merely that of informers.

The appellants' effort was, in effect, to secure, by intervention in the anti-trust suit, the benefits of an independent suit in equity, seeking, upon the pretext of public interest, an injunction against an alleged violation of the Anti-Trust Act.

It is unnecessary to do more than refer to a few of the numerous authorities in this Court to the effect that the right to seek and obtain injunctive relief for public wrongs under the Anti-Trust Acts is confined to suits in equity by the United States under the direction of the Attorney General.

Minnesota v. Northern Securities Company,
194 U. S. 48, at page 70.

*Wilder Manufacturing Company v. Corn
Products Refining Company*, 236 U. S. 165,
at page 174.

Paine Lumber Company v. Neal, 244 U. S. 459, at page 471.

Geddes v. Anaconda Copper Mining Company, 254 U. S. 590, at page 593.

General Investment Company v. Lake Shore & Michigan Southern Railway, 260 U. S. 261, at page 286.

The appellants could not avoid the force of these decisions by intervening in the suit of the United States. Their intervention gave them no status as litigants in that proceeding and any order entered upon their petition would be solely for the protection of the public interest.

II.

The Original Complainant, the United States, Having Assumed the Protection of the Public Interest by Supplemental Petition, and Having Acquiesced in the Denial Thereof, the Appellants Cannot Usurp the Function of the Attorney General by Prosecuting an Appeal in the Public Interest.

When appellants' petition came on for hearing on June 5, 1922, the complainant, the United States, at first declined to participate in the proceeding on the ground that the public interest was too remote (R., 74). Subsequently, however, but before a decision was rendered on appellants' petition, the United States filed a supplemental petition (R., 62-72) alleging the same facts and

asking for substantially the same relief. The appellants' function as informers, if it ever had a valid basis, ceased when the United States itself undertook the protection of the alleged public interest. The Court dismissed both petitions and the United States, the sole official and rightful conservator of the public welfare, has accepted that dismissal. It has not appealed therefrom. The appellants cannot usurp the function of the Attorney General by prosecuting in the public interest an appeal from an order in which he has elected to acquiesce.

United States v. Northern Securities Company, supra.

The appellate jurisdiction of this Court can only be invoked by a party having a personal interest in the litigation.

Smith v. Indiana, 191 U. S. 138.

McCandless v. Pratt, 211 U. S. 437.

The cases just cited also establish that one seeking to prosecute an appeal in behalf of a public interest does not have the requisite standing to maintain such appeal merely because he is a member of the public whose interest he seeks to assert and that in the absence of such standing the appeal will be dismissed by this Court.

III.

The Appellants, Having No Standing to Appeal in the Public Interest, and Their Private Interests Having Been Finally Adjudicated by a Court of Competent Jurisdiction, the Decision of the Court Below Was Not a Final Determination of Any Substantial Right of the Appellants, and They Therefore Have No Standing to Appeal.

The present appeal is maintainable only under the provisions of Section 2 of the Expedition Act, 32 Stat. 823, 36 Stat. 854, under which an appeal to this Court lies only from the *final decree* of the court below. An adjudication is not final in such sense as to be appealable unless it involves a determination of a substantial right against a party in such a manner as leaves him no adequate relief except by recourse to an appeal.

Odell v. Batterman Company, 223 Fed. 292-295.

American Brake Shoe & Foundry Company v. New York Railways Company, 282 Fed. 523-527.

As above pointed out, no right of the appellants was asserted by their petition or was in any way denied or involved in its dismissal. The public right asserted in their petition was not *their* right. Their private rights had been finally determined by the Ohio Courts. The order of dismissal was therefore not a final decree of the court below from which they were entitled to appeal.

I V .

Authorities Permitting, in Equity Suits Brought by the United States under the Anti-Trust Act, Intervention for the Protection of Private Interests and Recognizing a Right of Appeal in Such Intervenors, Have No Application to the Present Case.

We of course do not assert that one may never, in an equity suit brought by the Government under the Anti-Trust Act, intervene for the protection of his private rights, or that he may not have an appeal from a denial of the rights which he asserts. Such intervention was permitted in the court of first instance in *Continental Insurance Company v. U. S.*, 259 U. S. 156, and in *Terminal Railroad Association v. U. S.*, 45 Supreme Court Reporter 5 (not yet officially reported), and an appeal by the intervenors was heard by this Court in *Continental Insurance Company v. U. S.*, *supra*. But the present case is quite different. These appellants were concluded by the decision of the State courts of Ohio, to which they saw fit to submit the determination of their private rights. They were estopped by the express terms of the contract of October 7, 1916 (R., 57-62) which Jones, their sole stockholder, signed, which he cooperated in submitting to the court below and which that court approved. They thereby forfeited any standing they might otherwise have had seasonably to present their private interests to that court and to appeal from its decision. They sought to intervene for the protection of the public interest only and such intervention, as we have shown, gave them no right of appeal to this Court.

V.

The Motion to Dismiss Should Be Granted.

March, 1925.

ARTHUR H. VAN BRUNT,
Solicitor for Appellee,
Central Union Trust Company
of New York.

JOHN F. WILSON,
Solicitor for Appellee,
The Hocking Valley Railway
Company.

ARTHUR H. VAN BRUNT,
JOHN F. WILSON,
A. C. REARICK,
PAUL SMITH,
of Counsel.

FILED

APR 25 1925

WM. R. STANSEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1924 1925

NO. 51

THE BUCKEYE COAL AND RAILWAY COMPANY and
THE SUNDAY CREEK COAL COMPANY,
Appellants,

vs.

THE HOCKING VALLEY RAILWAY COMPANY, CEN-
TRAL UNION TRUST COMPANY OF NEW YORK
and THE UNITED STATES OF AMERICA,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION.

BRIEF FOR APPELLEE, THE HOCKING VALLEY
RAILWAY COMPANY.

JOHN F. WILSON,

*Solicitor for Appellee, The Hocking
Valley Railway Company.*

JOHN F. WILSON,
A. C. REARICK,
PAUL SMITH,
of Counsel.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1924.

No. 368.

THE BUCKEYE COAL AND RAILWAY COMPANY and
THE SUNDAY CREEK COAL COMPANY,
Appellants,

vs.

THE HOCKING VALLEY RAILWAY COMPANY, CENTRAL
UNION TRUST COMPANY OF NEW YORK and THE
UNITED STATES OF AMERICA,
Appellees.

Appeal From the District Court of the United States for
the Southern District of Ohio, Eastern Division.

BRIEF FOR APPELLEE,
THE HOCKING VALLEY RAILWAY COMPANY.

STATEMENT.

The present appeal is taken by appellants from an order of the United States District Court for the Southern District of Ohio, Eastern Division, dismissing a peti-

tion filed by appellants by leave of said Court in a proceeding theretofore pending in said Court under the title *United States of America v. Lake Shore & Michigan Southern Railway Company, et al.*, In Equity, No. 1584. The material facts are succinctly stated in the opinion of the Court below, filed January 18, 1924 (R., 109-113):

"In the year 1912 the United States began suit in equity herein against six railroad companies and three coal companies, named in the margin hereof,¹ to dissolve a combination alleged to violate the Sherman anti-trust act (July 2, 1890, c. 647, 26 Stat. 209). Our decree of March 14, 1914, declared the combination to be in violation of the Act, and ordered dissolution by the sale of the railway companies' interests in the stock of the Sunday Creek Company, the disposition of stock in the Kanawha & Michigan Railway Company, and otherwise, including the enjoining of the Lake Shore & Michigan Southern, the Toledo & Ohio Central, the Hocking Valley and the Chesapeake & Ohio Railroad Companies from owning or controlling any stock in the Sunday Creek Company, or any interest in any of the coal properties in which that company is interested. Jurisdiction of the cause was expressly retained by the decree for the purpose of making such other and further orders and decrees as might be necessary to the due execution of the decree of 1914, and the complete dissolution of the combination condemned thereby. A detailed history of the case will be found in the opinion of this court upon which that decree was based. *United States v. L. S. & M. S. Ry. Co., et al.*, 203 Fed. 295. Under that retention, orders have been made from time to time, as deemed necessary, to effectuate dissolution.

¹ The Lake Shore & Michigan Southern Railway Company, the Chesapeake & Ohio Railway Company, the Hocking Valley Railway Company, the Toledo & Ohio Central Railway Company, the Kanawha & Michigan Railway Company, the Zanesville & Western Railway Company, The Sunday Creek Company, the Continental Coal Company, the Kanawha & Hocking Coal & Coke Company.

"When that decree was made the Hocking Valley Railway Company owned the entire of the capital stock of the Buckeye Coal & Railway Company (consisting of 2500 shares), all of which except five qualifying shares were held in pledge by the Central Trust Company, as trustee under the Hocking Valley Railway Company's First Consolidated Mortgage of 1899, by which mortgage the Buckeye Company had conveyed certain coal lands as further security for the payment of the Hocking Valley Railway Company's bonds secured by that mortgage, by the terms of which the Buckeye Company agreed to deliver, beginning July 1, 1900, yearly statements of coal mined, and to pay two cents per ton on such coal, to be used as a sinking fund for the purchase and cancellation to that extent of the mortgage bonds of the Hocking Valley Company.

"On May 19, 1916, upon application of the United States, this court made an order that the capital stock of the Buckeye Company be sold free and clear of the mortgage lien, and that the proceeds thereof be paid to the mortgage trustee to apply on the mortgage bonds (281 Fed. 1007). Under that order the Buckeye Company stock was sold to John S. Jones for \$50,000 (in connection with the sale to him of the outstanding stock and bonds of the Ohio Land & Railway Company for \$400,000), the sale being approved by this court upon presentation of the contract of sale between Jones, on the one part, and the Hocking Valley and Chesapeake & Ohio Railway Companies, on the other, and after taking the testimony of witnesses in open court relating to conformity of such sale to the order of May 19, 1916, the reasonableness of the price paid, and the satisfactory status of the purchaser—the mortgage trustee in connection therewith waiving its then pending appeal to the Supreme Court from the order of May 19, 1916. The contract between Jones and the railroad companies contained a recital of the inclusion in the Hocking Valley mortgage of the Buckeye real estate as such further security for the pay-

ment of the mortgage bonds, as well as the agreement in the mortgage for the payment by the Buckeye Company of the two cents per ton royalty on coal mined from its property so mortgaged. This recital was followed by express provision that the Hocking Valley Company should cause all the mortgaged property of that company to be first exhausted before any recourse under the mortgage to the property of the Buckeye Company; and that the Hocking Valley Company indemnify the Buckeye Company from any loss or damage to or payment by that company under the provisions of the mortgage 'save only said two cents per ton royalty above mentioned', and that nothing contained in said agreement was intended or should be construed in any-wise to limit, or affect or impair, the several covenants or obligations of the Buckeye Coal & Railway Company contained in said mortgage.

"After the purchase by Jones (who owned and owns all the Buckeye stock), the Buckeye Company failed and refused to carry out the provision for royalty payment. The mortgage trustee began suit in this court, in the year 1919, for the collection thereof, which suit is still pending and undetermined. In the same year the Buckeye Company instituted suit in a state common pleas court of Ohio to quiet its title against the claims of the mortgage trustee under the Hocking Valley mortgage. The Sunday Creek Coal Company of Ohio (not the original Sunday Creek Company), which had succeeded to the rights of the Buckeye Company in the lands, was made a party plaintiff. Upon final hearing upon issues joined, the Common Pleas Court dismissed the petition, adjudging that the mortgage 'and the covenants of the Buckeye Coal & Railway Company therein contained, are valid and binding obligations, and a good and valid lien upon the real property in said mortgage described.' This decree was affirmed by the State Court of Appeals, the Supreme Court of Ohio declining to order the case certified for its

review. Thereupon the Buckeye Company and the Sunday Creek Coal Company filed their petitions in this Court, asserting that the situation created by the Hocking Valley trust mortgage, including especially the two cents per ton royalty provision, was in violation of the decree of dissolution previously made by this court; and asking that the demand or collection of the two cents per ton royalty be enjoined, the lands of the Buckeye Company released from the mortgage, and particularly from section 9 thereof (which contains the royalty provision), or that all interests of the railway company and the mortgage trustee in the Buckeye property be sold, or such other and appropriate order as will 'effectively carry out the purpose and effect' of the decree of 1914. After issues joined on the petition, and before decision thereon, the United States filed its supplemental petition herein, asking that the Buckeye coal lands be released from the lien of the Hocking Valley mortgage and the Buckeye Company discharged from its obligation to pay the two cents per ton royalty, upon payment by the Buckeye Company, or its successors in interest, to the Hocking Valley's mortgage trustee the reasonable value of the rights of the trustee, to be judicially ascertained; and on the ground that the situation created by such lien and royalty provision violates the anti-trust act and contravenes the original decree of dissolution made herein. It will be observed that the substantial difference between the petitions of the coal companies and the Government, respectively, is that the one asks such release without, the other upon, compensation to the mortgage trustee."

Matters of evidence referred to in the foregoing statement of facts appear in the record herein as follows:

Final Decree of March 14, 1914 (R., 165).

Material portions of First Consolidated Mortgage, March 1, 1899, The Hocking Valley Railway Company and The Buckeye Coal and Railway

Company to Central Trust Company of New York, Trustee (R., 215-220).

Order of May 19, 1916, directing sale of capital stock of The Buckeye Coal and Railway Company (R., 201-209).

Contract, October 7, 1916, for sale of The Buckeye Coal and Railway Company stock to John S. Jones (R., 57-62).

Order approving sale under contract of October 7, 1916, and order directing entry thereof (R., 212-213).

Admission of non-payment of royalties (R., 45).

Abstract of proceedings in Ohio State Courts (R., 246-247).

Upon the foregoing facts the Court below reached conclusions which were clearly and concisely stated in the opinion of the Court as follows (R., 113-115):

“So far as concerns the petition of the Buckeye Company and the Sunday Creek Company, we think it clear that relief should be denied. While our jurisdiction generally to make such further orders and decrees as should be necessary to the due execution of our main decree, and the complete dissolution of the condemned combination, continued without abatement until such complete dissolution should be effected (*United States v. L. S. & M. S. Ry. Co., et al., supra*), there is perhaps substantial force in the thought that the order of this court of May 19, 1916, and the sale of the Buckeye Company's stock thereunder, exhausted the jurisdiction of this Court over the specific question whether the situation created by the lien of the Hocking Valley mortgage upon the Buckeye Company's lands, given to secure the Railroad's indebtedness, in connection with the tonnage royalty provision, was so far unlawful as to require its elimination. This court approved the sale of the stock to Jones with full knowledge of the fact situation now complained of, and pre-

sumably without its occurring to either court or Government's counsel that the situation created a substantial interference with the free competition aimed at by the original decree. The action taken might not improperly be thought to carry a tacit implication that the situation here presented was not then regarded open to criticism. But wholly apart from this consideration, and without passing upon its merits, we think relief forbidden by these further considerations: In the first place, assuming for the purposes of this opinion, that the petitioning coal companies have a legal interest in the elimination of the alleged unlawful feature, we see no reason to doubt that, as between the two original petitions and the Hocking Valley Company and its mortgage trustee, the decree of the state court binds both the Buckeye Company and the Sunday Creek Company as an adjudication of the complete validity of the mortgage as against the attacks now made upon it. Again, this is a proceeding in equity, and it is manifestly inequitable that either Jones or those standing in his right escape liability for a situation assumed by them, and, as we must find, then recognized as of binding force, and whose assumption seems fairly to have been part of the consideration paid by Jones for the Buckeye stock. In the situation presented, we think the petitioning coal companies cannot be heard to say that payment of the royalty, or the continuance of the mortgage lien upon the lands of the Buckeye Company, would violate the law. The fact that the Government did not answer or take issue upon the coal companies' petition cannot alter the result otherwise reached. The petition of the coal companies must be denied.

"The Government's supplemental petition rests upon a different foundation. It is conceded that the decision of the Supreme Court in the Reading case (*Continental Coal Co. v. United States*, 259 U. S. 156), announced about six years after the sale to Jones of the Buckeye stock, and shortly before the filing of the Government's supplemental petition before us, suggested to Government's

counsel the invalidity of the situation we are considering. It was eminently proper that the Government bring this situation before the Court, and afford opportunity for such action, if any, as should seem to be called for. But we are not impressed that the situation calls for the relief asked. Again passing without decision the question of the exhausting of jurisdiction of this court over the subject-matter of the supplemental petition, by the action had in the sale to Jones, it seems plain that even in view of the Reading decision the criticized situation is not so clearly improper, nor so substantial, as to justify the action which the Government now asks. Whatever theoretically potential interference with free competition might otherwise be created by the railroad-mortgage lien upon the Buckeye lands in connection with the royalty tonnage provision, we think such interference practically reduced to a minimum by the fact that by the contract between Jones and the railroad companies the railroad property must first be exhausted before resort can be had to the coal lands, in connection with the fact that no suggestion is made that the railroad property is not entirely adequate to meet the payment of the mortgage in full, and the payment of the mortgage puts an end to the royalty. Indeed, an affirmative inference, more or less strong, in favor of the adequacy of the railroad security seems fairly deducible from the record presented to us. We therefore think that it will be time enough to question the invalidity of the situation we are discussing when, if ever, it becomes acute.

"We are accordingly constrained to dismiss the Government's supplemental petition. The dismissal, however, will be without prejudice to its right to make further application for relief, when, if ever, the situation may be thought to justify it, in view of the considerations we have stated."

ABSTRACT OF ARGUMENT.

Our broad contentions are, briefly:

First that the appeal should be dismissed because the appellants have no standing to maintain it (Point I, *infra*, pp. 9-17).

Second that even if this Court concludes that appellants have standing to maintain the appeal, the order dismissing appellants' petition and herein appealed from should be affirmed:

- (a) because the Court below was without jurisdiction to grant the relief prayed for by appellants (Point II, *infra*, pp. 27-43).
- (b) because appellants' petition disclosed no violation of the Anti-Trust Act or of the lower Court's final Decree (Point III, *infra*, pp. 43-58).
- (c) because to have granted appellants' prayer would have been manifestly inequitable (Point IV, *infra*, pp. 58-79).

ARGUMENT.

I.

The Appellants Are Without Standing to Prosecute an Appeal to This Court and the Appeal Should Therefore be Dismissed.

On April 20, 1925, the appellees, The Hocking Valley Railway Company and Central Union Trust Company of New York, submitted to this Court a motion to dismiss the appeal herein upon the ground above stated. It is possible that the Court may conclude to defer consideration of the questions raised by that motion until the hearing of the case upon the merits and we therefore file this brief and as the first point thereof here repeat, without substantial change, our argument heretofore presented in support of said motion to dismiss, as follows:

(a) THE APPELLANTS, HAVING INTERVENED SOLELY AS INFORMERS TO CALL ATTENTION TO AN ALLEGED PUBLIC INTEREST, ACQUIRED NO STATUS AS LITIGANTS.

The appellants sought to file their petition solely to protect an alleged public interest and in order to "effectively carry out the purpose and effect of the main decree" (Appellants' petition, R., 7-11, Appellants' reply, R., 44-45). The appellants' pleadings expressly admit that their private controversy with the appellees was previously disposed of in proceedings in the Ohio State Courts (R., 11, 44). Their application to intervene might

therefore have been denied by the Court below on the authority of *United States v. Northern Securities Company, et al.*, 128 Fed. 808, where the Court said, at pages 811-812:

"The application for leave to intervene contains the further suggestion, made on information and belief only, that the proposed plan of disposing of the stock of the Northern Pacific and Great Northern Railway Companies would result in leaving the control of the two railroads in the hands of persons who co-operated in forming the Securities Company, and that the petitioners should be permitted to intervene and obtain further order to prevent such a result. . . .

The United States is the complainant in this case. It is the conservator of the public welfare, and has a right to speak for the public. According to well-established rules, the petitioners cannot intrude into this litigation merely to protect the public interest or as *amici curiae* so long as the government is present by its attorney general and expresses its disapproval of such intrusion. This would be wresting from the government that control over the litigation, so far as the public is concerned, which it has a right to exercise. The petitioners can intervene only for the protection of their own individual interests, and for that purpose only in the event that they can obtain adequate protection in no other way."

They were, however, permitted to intervene in the anti-trust suit but for the sole purpose of calling the Court's attention to alleged violations of, or failure to conform to, the terms of its final decree or of subsequent orders or decrees made in furtherance of that decree. Their capacity was merely that of informers.

The appellants' effort was, in effect, to secure, by intervention in the anti-trust suit, the benefits of an in-

dependent suit in equity, seeking, upon the pretext of public interest, an injunction against an alleged violation of the Anti-Trust Act.

It is unnecessary to do more than refer to a few of the numerous authorities in this Court to the effect that the right to seek and obtain injunctive relief for public wrongs under the Anti-Trust Acts is confined to suits in equity by the United States under the direction of the Attorney General.

Minnesota v. Northern Securities Company,
194 U. S. 48, at page 70.

*Wilder Manufacturing Company v. Corn
Products Refining Company*, 236 U. S. 165,
at page 174.

*Paine Lumber Company, Limited, et al. v.
Neal, etc.*, 244 U. S. 459, at page 471.

Geddes v. Anaconda Copper Mining Company,
254 U. S. 590, at page 593.

*General Investment Company v. Lake Shore
& Michigan Southern Railway Company, et
al.*, 260 U. S. 261, at page 286.

The appellants could not avoid the force of these decisions by intervening in the suit of the United States. Their intervention gave them no status as litigants in that proceeding and any order entered upon their petition would be solely for the protection of the public interest.

(b) THE ORIGINAL COMPLAINANT, THE UNITED STATES,
HAVING ASSUMED THE PROTECTION OF THE PUBLIC INTEREST

BY SUPPLEMENTAL PETITION AND HAVING ACQUIESCED IN THE DENIAL THEREOF, THE APPELLANTS CANNOT USURP THE FUNCTION OF THE ATTORNEY GENERAL BY PROSECUTING AN APPEAL IN THE PUBLIC INTEREST.

When appellants' petition came on for hearing on June 5, 1922, the complainant, the United States, at first declined to participate in the proceeding on the ground that the public interest was too remote (R., 74). Subsequently, however, but before a decision was rendered on appellants' petition, the United States filed a supplemental petition (R., 62-72) alleging the same facts and asking for substantially the same relief. The appellants' function as informers, if it ever had a valid basis, ceased when the United States itself undertook the protection of the alleged public interest. The Court dismissed both petitions and the United States, the sole official and rightful conservator of the public welfare, has accepted that dismissal. It has not appealed therefrom. The appellants cannot usurp the function of the Attorney General by prosecuting in the public interest an appeal from an order in which he has elected to acquiesce.

United States v. Northern Securities Company et al., 128 Fed. 808.

The appellate jurisdiction of this Court can only be invoked by a party having a personal interest in the litigation.

Smith v. Indiana, 191 U. S. 138.

McCandless v. Pratt, 211 U. S. 437.

The cases just cited also establish that one seeking to prosecute an appeal in behalf of a public interest does not have the requisite standing to maintain such appeal merely because he is a member of the public whose interest he seeks to assert and that in the absence of such standing the appeal will be dismissed by this Court.

(c) THE APPELLANTS, HAVING NO STANDING TO APPEAL IN THE PUBLIC INTEREST, AND THEIR PRIVATE INTERESTS HAVING BEEN FINALLY ADJUDICATED BY A COURT OF COMPETENT JURISDICTION, THE DECISION OF THE COURT BELOW WAS NOT A FINAL DETERMINATION OF ANY SUBSTANTIAL RIGHT OF THE APPELLANTS, AND THEY THEREFORE HAVE NO STANDING TO APPEAL.

The present appeal is maintainable only under the provisions of Section 2 of the Expedition Act, 32 Stat. L. 823, 36 Stat. L. 854, under which an appeal to this Court lies only from the *final decree* of the Court below. An adjudication is not final in such sense as to be appealable unless it involves a determination of a substantial right against a party in such a manner as leaves him no adequate relief except by recourse to an appeal.

Odell v. H. Batterman Co., 223 Fed. 292, 295.
American Brake Shoe & Foundry Company v.
New York Railways Company, 282 Fed.
 523, 527.

As above pointed out, no right of the appellants was asserted by their petition or was in any way denied or involved in its dismissal. The public right asserted in

their petition was not *their* right. Their private rights had been finally determined by the Ohio Courts. The order of dismissal was therefore not a final decree of the court below from which they were entitled to appeal.

(d) AUTHORITIES PERMITTING, IN EQUITY SUITS BROUGHT BY THE UNITED STATES UNDER THE ANTI-TRUST ACT, INTERVENTION FOR THE PROTECTION OF PRIVATE INTERESTS AND RECOGNIZING A RIGHT OF APPEAL IN SUCH INTERVENORS, HAVE NO APPLICATION TO THE PRESENT CASE.

We of course do not assert that one may never, in an equity suit brought by the Government under the Anti-Trust Act, intervene for the protection of his private rights, or that he may not have an appeal from a denial of the rights which he asserts. Such intervention was permitted in the court of first instance in *Continental Insurance Company v. United States, Reading Company, et al.*, 259 U. S. 156, and in *Terminal Railroad Association v. U. S.*, 45 Sup. Ct. Rep. 5 (October Term, 1924, No. 115, decided October 13, 1924; not yet officially reported), and an appeal by the intervenors was heard by this Court in the former case. But the present case is quite different. These appellants were concluded by the decision of the State courts of Ohio, to which they saw fit to submit the determination of their private rights. They were estopped by the express terms of the contract of October 7, 1916 (R., 57-62) which Jones, their sole stockholder, signed, which he cooperated in submitting to the Court below and which that Court approved. They thereby forfeited any standing they might otherwise have had seasonably to present their private interests to that Court

and to appeal from its decision. They sought to intervene for the protection of the public interest only and such intervention, as we have shown, gave them no right of appeal to this Court.

In addition to the foregoing argument presented by us in support of our motion to dismiss we here desire to call the Court's attention to a decision released by the Court of Appeals of the State of New York on April 6, 1925, after our said motion and argument were filed. In this decision the Court held that the Association of the Bar of the City of New York had no standing to prosecute an appeal from a determination by the Appellate Division, refusing to disbar an attorney upon grounds presented by said Association. Judge Hiscock, speaking for the Court, said:

" . . . it seems to us quite clear that the Association simply discharges the duty of calling to the attention of the Appellate Division, under our law charged with the duty of supervising the conduct of attorneys, some alleged misconduct and then, if the Appellate Division thinks that course should be pursued, discharges the further duty of prosecuting the accusation and presenting the evidence which will enable the Court finally to decide whether it should exercise its disciplinary powers, and that in following this course it occupies the status which might be occupied by any member of the profession and becomes a friend and agency of the Court rather than a party. It is not a party in any accepted sense. Its petition does not ask for any relief whereby existing rights may be confirmed or new ones secured. To use the precise language of its prayer in this matter it 'submits this matter (the alleged misconduct of respondent) to the Court and asks that such action may be taken

as justice may require'. Thus it is in no legal sense a party asserting rights which, if granted, will be beneficial to it, and a decision adverse to its views does not lessen, impair or destroy any of its rights but affects only that interest which every member of the profession, and the entire community for that matter, has in the proper discharge by attorneys of the duties and responsibilities conferred upon them. In all of these features we see an entire lack of character as a party and an entire absence of legal interest based either upon alleged rights or upon a right and obligation to discharge certain official duties (*People ex rel. Burnham v. Jones*, 110 N. Y. 509), and the denial of which rights would present that situation of being aggrieved which would sustain an appeal."

Matter of Dolphin, N. Y. Court of Appeals, not yet reported.

This decision of the Court of Appeals of New York very clearly lays down the principles above urged in support of our motion to dismiss, and which we contend control the disposition of the present appeal.

(e) APPELLANTS' OBJECTIONS CONSIDERED.

As we are repeating our previous argument as above pointed out upon the assumption that the Court may conclude to defer consideration of the questions raised by our motion to dismiss until the presentation of the case upon the merits, we think it proper to refer briefly to appellants' argument submitted in opposition to our motion.

In that argument appellants in substance urge the following objections to the granting of our motion:

1. That we did not object in the Court below to appellants' filing their intervening petition (pp. 1-7).

A. That appellants intervened chiefly because of their own important financial interest and only incidentally as informers as to the public interest (pp. 8-10).

A. That our motion and brief in support thereof involved the merits (pp. 10-12).

A. That appellants have not usurped or attempted to usurp the functions of the United States, the District Attorney or the Attorney General (pp. 12-13).

The following comments seem to be pertinent:

1. With reference to appellants' first objection.

It is true that we did not formally object to the filing of appellants' petition. Indeed we had no opportunity to do so. The Court's Order of December 6, 1921 (R., II) indicates that the petition was presented *ex parte* and was ordered to be filed without preliminary hearing. The order directed service upon the District Attorney and the appellees and required answer within ten days.

It is not true, however, as appellants assert (Appellants' Motion Brief, p. 7) that we do not question the action of the Court below in allowing the petition to be filed or that we concede appellants' right to make the intervention. We pointed out (*supra*, pp. 10-11) that the application to intervene might have been denied by the Court below on the authority of *United States v. Northern Securities Company et al.* (128 Fed. 808). We also pointed out (*supra*, p. 11) that while appellants were permitted to intervene in the anti-trust

suit, they were admitted solely in the capacity of informers. In other words, we then contended and now contend that the only conceivable justification for permitting the appellants to file their petition was that they might, in the public interest, call attention to alleged violations of the Court's final decree, and that the fact that appellants rightly or wrongly were permitted to file the petition for that purpose did not give them standing to appeal from the dismissal of their petition. There is an obvious *non sequitur* in appellants' argument that because they were permitted to file their petition and because we answered it, they thereby acquired the right of appeal. They cite no authority in support of this contention.

The cases cited by us (*supra*, p. 13):

Smith v. Indiana, 191 U. S. 138,

McCandless v. Pratt, 211 U. S. 437,

and the decision of the Court of Appeals of New York in *Matter of Dolphin* (*supra*, pp. 16-17) are clear authorities that appellants' right to maintain an appeal does not depend upon the fact that they may have had a right to be heard in the Court below, but upon whether they had such direct interest in the subject matter of the decision below as to constitute them parties aggrieved thereby.

Appellants' brief on the motion (pp. 3-5) discusses at some length whether the Buckeye Company was a party before presentation of the petition of December 6, 1921. While appellants concede that the question is unimportant, we consider it as it may have a possible bearing upon their later argument (Appellants' Motion

Brief, p. 8) that the Federal Court had prior jurisdiction *over all the parties*. The fact that both appellants and the Court deemed it necessary that leave be granted to file the petition, *i. e.*, that an intervention be permitted, clearly indicates that they were not previously parties. The Order of January 27, 1923 (R., 72-73) is even more conclusive. It directed that *appellants* be made *parties defendant* to the Government's supplemental petition and that copies be served upon both *appellants and appellees*. The distinction made between the appellants and appellees is very clear. The appellees, who were parties to the original suit, did not have to be made parties. The contrary was true of appellants.

Appellants undertake to supplement their doubtful resort to inference to establish their status as parties by asserting that they became parties by intervention under Equity Rule 37. But appellants cannot thus establish their status as litigants. The rule provides that "*any one claiming an interest in the litigation may at any time be permitted to assert his right by intervention,*" etc. (Italics ours). Appellants' petition did not claim an interest in the litigation and did not assert any right *of appellants*. In their petition and reply appellants went out of their way to point out that their petition was filed not to assert individual rights but to protect an alleged public interest (R., 11, 44). They were informers, not parties in interest, and therefore not litigants. Doubtful as we have already shown their right to come in even as informers to be, it is enough for our purpose that their so-called intervention asserted no right of appellants a denial of which could support an appeal.

2. *With reference to appellants' second objection.*

It is difficult to follow the tortuous course of appellants' assertions as to the theory upon which they filed their petition, or as to the effect of the prior decision of the Ohio Courts. Their petition (R., 11) said:

"Lately the Ohio Court of Appeals for Perry County has decided in a suit to quiet title and over the contention of your petitioners, that *as between your petitioners and the said railroad and trust companies* said Section 9 of Article 2 of said mortgage is valid." (*Italics ours.*)

The petition then prayed that any demand or collection of the 2 cent royalty be enjoined and that the Buckeye lands be released from the mortgage, particularly Section 9 thereof or for "such other and appropriate order herein as will effectively carry out the purpose and effect of the main decree herein."

In the Ohio suit there was an issue between appellants and appellees as to the validity of the mortgage and covenants "*including the matters and things now set up in respect thereof in the petition of the appellants herein*" (R., 246. *Italics ours*) and upon the trial the mortgage and covenants were adjudged valid and binding (R., 246). The appellants have approved the above as a correct statement of those proceedings (R., 249).

In their reply of March 21, 1922, appellants refer as follows to the Ohio suit:

"Petitioners aver that the proceedings mentioned in paragraphs 15 of said answers were not decided in a case in which any person representing the public, either state or federal, was present or involved; *that no questions of public policy were considered* and that the cases were so de-

cided simply, solely and technically upon the ground that the Buckeye Coal & Railway Company had actually and physically executed the \$20,000,000 mortgage made by the Hocking Valley Railway Company, thereby pledging its lands as additional security to said bonds; and that such decision is *not res adjudicata in this cause, where in matters of public policy are involved* and in which the main decree was entered about four or five years before the proceedings set up in said paragraphs 15 were begun and carried on, and that such proceedings cannot, therefore, have any controlling effect upon the propriety and effect of said principal decree entered in this cause or of what should be done in this case upon the present petition." (R., 44. Italics ours.)

Appellants' principal brief characterizes the Ohio suit as follows:

"The Sherman Anti-Trust act was not involved in that suit to quiet title; *no person represented the public*; neither the United States nor the State of Ohio was present. It was simply a private suit between the persons named, *relying on the decree of March 14, 1914*, and being such suit, the court of common pleas, in January 1920, decided the case on the merits in favor of defendants, thereby for the purposes of that suit sustaining the validity of the mortgage. *That court disregarded all public policy*, disregarded the opinions and decrees of the federal court in this case, *and treated the suit simply as a private dispute between the parties named.*" (pp. 12-13. Italics ours.)

"The Buckeye Company went into the state court *relying upon the decree of March 14, 1914*, and urged the state court to clear the title to its lands in conformity with that decree. If the state court refused in such a proceeding to recognize the validity of the decree of March 14, 1914, and arrived at some other conclusion, that conclusion is not binding upon the Federal Court. Especially

is this true as the *two petitions before the court in June, 1923, are founded upon that decree of March 14, 1914, and only asked its enforcement* and one of those petitions was presented by the United States. *Certainly so far as the United States is concerned, so far as public policy is involved, so far as the enforcement of the Sherman Anti-Trust Act is in question, the state court could not adjudicate contrary to the decree of March 14, 1914."* (pp. 38-9. Italics ours.)

Again referring to the charge that their present petition seeks inequitable results, appellants say:

"Jones had done nothing inequitable, but even if he had, yet *in behalf of the public* the separation must be carried out whoever may suffer." (p. 43. Italics ours.)

and finally, appellants, commenting on the decision of the Court below, say:

"A violation of the decree of March 14, 1914, is condoned and encouraged. The petitions both of the Buckeye Coal Co. and of the United States are denied, *and the interests of the public are left to care for themselves in the best manner they can.*" (p. 45. Italics ours.)

We think it unnecessary to add to appellants' characterization of the effect of their petition. We submit that their tardy discovery (Appellants' Motion Brief, p. 8) that they "intervened chiefly because of their own important financial interest and only incidentally as informers as to the public interest" is not convincing. They cannot now escape the record which they themselves have made, and in any event they avoid one horn of their dilemma only to impale themselves upon the other. If and insofar as they intervened to protect their

private interest, the Ohio suit, which the record shows involved all the grounds of illegality and invalidity asserted in their present petition, is *res adjudicata* against them. If, as we have shown, they sought the public interest solely, they were mere informers, not litigants, and have no standing to appeal.

Their suggestion (Appellants' Motion Brief, pp. 8-10) that the Federal Court acquired prior jurisdiction is not well founded. As appellants did not become parties to the anti-trust suit, even in a qualified sense as informers, until December 6, 1921, after the termination of the Ohio litigation, the Federal Court did not have prior jurisdiction of the parties. Nor did it have prior jurisdiction of the subject matter.

United States v. Northern Securities Company, 128 Fed. 808, at page 812.

3. *With reference to appellants' third objection.*

Our motion to dismiss does not involve the merits. Appellants base their assertion to the contrary upon the fact that we adopt the statement of facts by the Court below. A statement of facts is required by Clause 1 of Rule 6 of this Court and so of course the recital of the facts raises no inference whatever that the motion is made on the basis of any dispute as to facts so set out. The grounds of our motion to dismiss are perfectly clear: i. e., that it appears on the face of the record that the appellants have no standing to prosecute an appeal to this Court. Their own pleadings disclosed their lack of such standing in that they

sought in the Court below to present as informers a question solely of the public interest. This Court has but to look at the face of their petition and the claims which appellants themselves assert therein to ascertain that this is so.

4. *With reference to appellants' fourth objection.*

This objection takes exception to our characterization of appellants' proceedings as an attempt to usurp functions of the United States or the Attorney General. They again deny that they filed their petition solely to call the Court's attention to an alleged violation of its final decree or subsequent orders. They say that the petition, answers and reply are general, unlimited and unconditional in character except as they may have been limited by their terms. As we have pointed out, it is this very limitation of the scope of appellants' intervention by the terms of their own pleadings upon which we base our argument that they have no standing to appeal. They are concluded by the issues which they themselves have framed.

Nor is their suggestion that the United States has never objected to their intervention persuasive or material. Disregarding appellants' strenuous objection to the filing of the Government's supplemental petition which they asked be stricken from the files (R., 73), thus seeking to exclude the official guardian of the public interest from the control of this feature of the litigation, the controlling fact is that after appellants' petition was filed the Government filed its supplemental petition alleging the same facts and asking for similar, though not

identical, relief, and by failing to appeal has acquiesced in the Court's dismissal of that petition. It would be preposterous and absurd if appellants, asserting solely a public interest as we have shown, could be permitted by appeal to seek, for the public benefit, relief which the Attorney General, the custodian of the public interest, no longer deems desirable.

We believe that the argument on our motion and now advanced should finally dispose of this case and that the appeal should be dismissed. But in the event that this Court is of the opinion that the appeal should be entertained by it, we proceed to present what seem to us controlling reasons why the order of the Court below dismissing appellants' petition was clearly right and should be affirmed.

II.

The Court Below Properly Dismissed Appellants' Petition Because That Petition Sought a Modification of a Final Decree Which That Court Was Without Jurisdiction to Grant.

(a) THE OPINION OF THE COURT BELOW RECOGNIZED THAT ITS PREVIOUS ORDERS FINALLY DETERMINED THE DISPOSITION TO BE MADE OF RELATIONSHIPS BETWEEN THE HOCKING VALLEY, BUCKEYE AND CENTRAL TRUST COMPANIES.

In its opinion directing the dismissal of the appellants' petition the Court below said:

"So far as concerns the petition of the Buckeye Company and the Sunday Creek Company, we think it clear that relief should be denied. While our jurisdiction generally to make such further orders and decrees as should be necessary to the due execution of our main decree, and the complete dissolution of the condemned combination, continued without abatement until such complete dissolution should be effected (*United States v. L. S. & M. S. Ry. Co., et al., supra*), there is perhaps substantial force in the thought that the order of this court of May 19, 1916, and the sale of the Buckeye Company's stock thereunder, exhausted the jurisdiction of this court over the specific question whether the situation created by the lien of the Hocking Valley mortgage upon the Buckeye Company's lands, given to secure the Railroad's indebtedness, in connection with the tonnage royalty provision, was so far unlawful as to require its elimination. This court approved the sale of the stock to Jones with full knowledge of the fact situation now complained of, and presumably without its occurring to either court or Government's counsel that the situation created a substantial interference with the free competition aimed at by the original decree. The action taken might not improperly be thought to carry a tacit implication that the situation here presented was not then regarded open to criticism" (R., 113).

(b) THE LOWER COURT'S OWN VIEW OF THE FINALITY OF ITS PREVIOUS ORDERS IS SUPPORTED BY THE HISTORY OF THE PROCEEDINGS AFFECTING THE BUCKEYE PROPERTY.

The force of the foregoing is apparent from a review of the present record with respect to what occurred previous to the rendition of that opinion. For brevity we hereinafter refer to The Hocking Valley Railway Company as the Hocking Valley, to the Buckeye Coal & Railway Company as the Buckeye, and to the Central

Trust Company of New York (now Central Union Trust Company of New York) as the Central Trust.

The original opinion (203 Fed. 295; R., 117-164), wherein the Circuit Judges concluded that a combination in violation of the Anti-Trust Act existed in certain respects as alleged in the Government's bill, awarded relief, speaking broadly: *First*, with respect to relations between certain defendant railroads, and, *Second*, with respect to relations between certain defendant railroads and certain coal properties. Upon the second aspect of the case, material findings of the Final Decree, entered March 14, 1914 (R., 165-183), are as follows:

"(9) Railroad Acquisition and Control of Coal Properties. Pursuant to the plan of reorganization of 1899, the Buckeye Coal & Railway Company was incorporated under the laws of Ohio, and the Hocking Valley and this coal company joined in the execution of a mortgage under date of March 1, 1899, providing for the issue of first-mortgage bonds in the sum of \$20,000,000, and secured by the properties acquired by such companies. This coal company was organized for the purpose of obtaining the coal properties of the Hocking Coal & Railroad Company, and these properties were bid in and conveyed to the Buckeye Coal & Railway Company by the purchasing trustees at the judicial sale before mentioned, and such trustees received from the new coal company 2495 shares of its total capital stock of 2500 shares, and thereupon entered into a traffic agreement with the Hocking Valley to secure rail connections between coal mines and the main railroad line and also coal transportation, and the trustees at the time turned over the stock in the coal company to the Hocking Valley . . ." (R., 170-171).

"(10) Merger of Coal Interests Into Sunday Creek Company.* (a) The holdings in these coal properties were subsequently merged and placed in the Sunday Creek Company (not the Sunday Creek Coal Company). The Sunday Creek Company was organized under the laws of New Jersey with a capital stock of \$4,000,000; and it now controls more than 100,000 acres of land situated in the Hocking coal fields and the Kanawha coal district, together with about fifty coal mines and about three hundred and fifty coke ovens, which are tributary to the exclusively Ohio railroads before named and the Kanawha & Michigan. . . .

"(b) Special Trusts Created Respecting Shares in Sunday Creek Company. The Toledo & Ohio Central caused its shares in the Sunday Creek Company to be issued in the name of John H. Doyle, Trustee; and in April, 1908, just before the commodities clause of the Hepburn Act was to take effect, and in view of doubts as to its constitutional validity, the company entered into an agreement with him, by which the stock was in terms sold to him as trustee for the stockholders of the company, in whose names its stock might from time to time be registered and to whom dividends should be paid, and the certificate of stock and the contract have ever since been in his possession. On April 30, 1908, another contract similar to the one just mentioned was entered into between the Hocking Valley and the Central Trust Company of New York, respecting the shares of the former in the Sunday Creek Company. After reciting, among other things, that all of these

* To avoid confusion we should here explain that there were at various times three corporations whose corporate name contained the name "Sunday Creek". (1) The Sunday Creek Coal Company, an Ohio corporation existing prior to 1905; (2) The Sunday Creek Company (the company above referred to), a New Jersey corporation, organized in 1905, and whose name about 1916 was changed by John S. Jones to The Sunday Creek Coal Company; and (3) The Sunday Creek Coal Company, an Ohio corporation, organized by Jones in 1919, in connection with the merger of his numerous coal properties.

shares with others were pledged to the trustee as collateral security for the bonds issued under the first consolidated mortgage of the Hocking Valley and the Buckeye Coal & Railway Company, it was in terms agreed that the Hocking Valley had sold and assigned to the trustee all its interest in such shares of stock, subject to the lien of the mortgage and the rights of the bondholders thereunder, in trust, for the proportionate benefit of the holders of record of the stock of the Hocking Valley and for any distribution of its assets; that the trustee should have the right to vote the shares, to collect dividends, and (if the company was not in default under its mortgage) to distribute them among the holders of the stock. Further provision was made, common to both of such trust agreements, that in the event the Supreme Court should hold the commodities clause of the Hepburn Act constitutional, the trustees should sell such shares of stock and distribute the proceeds (subject to the lien of the mortgage before mentioned respecting the Hocking Valley shares) among the registered stockholders in the Toledo & Ohio Central and the Hocking Valley respectively. However, this provision has never been executed; the trustees still hold the legal title to the stock." (R., 172-173.)

References to the same facts also appear in the opinion of the Court (R., 124-125; 128-129). With respect to the relations thus found to exist the Court decreed as follows:

"(1) Sale of Railway Companies' Interests in Stock of Sunday Creek Company. That the equity and interest of the Lake Shore & Michigan Southern Railway Company, the Toledo & Ohio Central Railway Company, the Chesapeake and Ohio Railway Company and the Hocking Valley Railway Company, and each of them, in the capital stock of the Sunday Creek Company, shall be disposed of

by absolute sale. That the legal title to said stock held by the trustees, viz., John H. Doyle and the Central Trust Company, under the certain agreements of April 30, 1908, in substance described in the findings of fact aforesaid, be included in said sale, and that said sale be made free from every interest or claim of said trustees or either of them, and of any and all the railway companies last named, and of the stockholders of each and all of them.

"That said the Hocking Valley Railway Company, the Toledo & Ohio Central Railway Company, the Lake Shore & Michigan Southern Railway Company, and the Chesapeake & Ohio Railway Company, each and all of them, be and they hereby are perpetually enjoined from directly, or indirectly, owning, holding or acquiring any stock in said Sunday Creek Company, or in any of the companies hereinbefore named, the property of which is owned, leased or controlled by said Sunday Creek Company, intending hereby to impose an absolute prohibition against said railway companies, or any of them, owning or controlling any shares of stock in said Sunday Creek Company, or otherwise owning or controlling, directly or indirectly, any interest in any of the coal properties in which that company is interested; and that the Sunday Creek Company be and it hereby is perpetually enjoined from directly, or indirectly, permitting any share or shares of its capital stock to be voted by or on behalf of any of the said railway companies for any purpose whatever, at any meeting or otherwise of the stockholders of said Sunday Creek Company, or permitting any of such railway companies to exercise any control over or to have anything to do with the management of said Sunday Creek Company, and likewise from paying any dividends to or for any of such railway companies" (R., 177-179).

Provisions followed prescribing the time and method of sale.

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The Final Decree also contained the following provision retaining jurisdiction:

“(8) That jurisdiction of this cause be retained by this court for the purpose of making such other and further orders and decrees as may be necessary to the due execution of this decree and the complete dissolution of the combination and monopoly herein condemned” (R., 183).

Pursuant to the directions of the Final Decree the stock of the Sunday Creek Company was, with the approval of the Court, sold to John S. Jones (R., 184, 187, 250). This sale took place about October 1, 1914 and in connection therewith the Court approved the issue by the Sunday Creek Company of certain mortgage bonds; and the holding thereof for a limited time by the Hocking Valley (R., 185, 188, 250).

Subsequently, and prior to May 19, 1916, the corporate name of the New Jersey corporation, the Sunday Creek Company, was changed to Sunday Creek Coal Company (R., 205).

At the time the Final Decree of March 14, 1914 was entered the Court supposed that the sale of the stock of the Sunday Creek Company to a purchaser approved by the Court would effectually break up the combination so far as the union of coal and railroad interests was concerned (R., 205) although the provision of the decree retaining jurisdiction was later held by the Court to be broad enough to permit it to make the further order of May 19, 1916, hereinafter mentioned (R., 206).

Without further proceedings before, or action by, the Court, however, the Hocking Valley and The Chesapeake and Ohio Railway Company, its principal stockholder,

on July 26, 1915, filed with the Court a report that they were about to enter, subject to the approval of the Court, into a contract for the sale of the capital stock of the Buckeye and certain stock and bonds of the Ohio Land and Railway Company (R., 201). The Final Decree, as above quoted, had found that these securities were acquired in connection with the Reorganization of 1899 (R., 171); that they had been pledged under the First Consolidated Mortgage of the Hocking Valley and the Buckeye, and that, subject to that pledge, they had been trusted for the stockholders of the Hocking Valley (R., 173). The contract mentioned in the report of July 26, 1915, provided for the sale of these securities to one Poston, and that there should be issued to the Central Trust, in exchange for the bonds of the Ohio Land and Railway Company, \$700,000 of income mortgage bonds of a purchasing corporation to be organized by Poston (R., 201-202).

The Appellants' brief is not quite accurate in suggesting (page 4) that the Court, in its opinion of July 30, 1915 (R., 183-189), unqualifiedly disapproved the sale by reason of the income bond provision. The opinion contemplated the ultimate approval of the sale, including the holding by the Hocking Valley for the time being of the income bonds, provided, *first*, that the Court be satisfied that a sale for cash was impracticable (R., 186) and, *second*, that certain provisions be made to insure the coal property against railroad domination (R., 187-188). The parties later proposed certain modifications in the contract but they were not sufficient to satisfy the Court (R., 202, 204), and anyway Jones presently made a cash

offer and so the Poston contract was abandoned (R., 57-62, 209-212).

The concluding paragraph of the opinion of July 30, 1915, reads as follows:

"5. In these recent proceedings it has been brought to our attention that the Hocking owns \$190,000 of Kanawha bonds. Upon the hearing of the present petition counsel for the United States orally suggested that there were other coal properties and interests still held by some of the defendants in the principal case which under the decree it was their duty to sell. Upon the ninth day of October, 1915, we will hear any application which the Government's counsel desire to make upon any of these subjects. Suitable advance notice to all parties interested should be given so that there is opportunity for pleadings or affidavits in opposition and *so that on that day all matters, if any there are, which require our attention in order to carry out the decree may be ripe for hearing and disposition*" (R., 188-189, italics ours).

It will thus be observed that it was the Court's intention that on October 9, 1915, all matters which might require attention in order to carry out the Decree of March 14, 1914, should be presented and disposed of. It was clearly the purpose at that time to do whatever might be necessary under the reservation of jurisdiction contained in its Final Decree, in other words to exhaust that reservation.

Acting upon the Court's suggestion, the Government filed a petition (R., 189-192), whose prayer, so far as material, was as follows:

"Wherefore Your Petitioner Prays, that the defendant, The Hocking Valley Railway Company,

be required to sell, free from any claim, lien, or equity of any of the parties to this suit, including the lien of the Central Trust Company of New York, as Trustee under the Consolidated Mortgage made by The Hocking Valley Railway Company to it, and free from any equity in the stockholders, or any of them, of said The Hocking Valley Railway Company, and subject to approval, rejection, or modification by the Court, all of the capital stock in said The Buckeye Coal & Railway Company, in said The Ohio Land & Railway Company, in said The Boston Coal Dock & Wharf Company, in said The Raybould Coal Company, and also the bonds of said Kanawha and Hocking Coal and Coke Company, owned by said The Hocking Valley Railway Company. . . .

“That the defendant Railway Companies be required to sell any other coal properties owned by them, or by either of them, in which the Sunday Creek Company (now the Sunday Creek Coal Company) is interested, on terms subject to approval, rejection, or modification by the Court.

“That if within a period to be fixed by the Court, defendants do not comply with the decree in this respect, and report the same to the Court for its action thereon, that the Court will otherwise provide for the sale of such stocks and bonds, or of such coal properties, unless for good cause shown, the Court further extends the time, by such action as it may deem necessary and adequate to such purpose, either through appointment of a master to make such sale or of a receiver to take possession of said stocks and bonds, and said coal properties, with power to sell and dispose of the same, or in such other manner as will enforce compliance with the decree in this respect” (R., 191-192).

The Government, insofar as it sought a sale of the Buckeye stock and the stock and bonds of The Ohio Land & Railway Company, thus demanded action which the railroad companies had already proposed in their peti-

tion of July 26, 1915. Answers having been filed (R., 192-201) and evidence submitted (R., 203), the Court, on May 19, 1916, ordered as follows:

“(a) The equity and interests of the Hocking Valley Company and the Chesapeake & Ohio Railway Company in and to the certain capital stock, to wit, 2500 shares in the Buckeye Coal & Railway Company, 2006 shares in the Ohio Land & Railway Company and \$1,377,000 face value of the first mortgage bonds of the latter company, shall be disposed of by absolute sale; and the Central Trust Company of New York, as trustee under the first consolidated mortgage of the Hocking Valley, and as trustee under the contract of April 30, 1908, shall, upon the conditions hereinbelow stated, release all claim as trustee and as pledgee of such shares of stock and such bonds, and of each of them, upon receipt or tender of the proceeds derived from the sale or sales of such stocks and bonds respectively, provided, that in every instance such proceeds of sale shall be received and applied by such trustee under and according to the provisions of Article Seven of the first consolidated mortgage of the Hocking Valley to such trust company, bearing date March 1, 1899 (Vol. V. Tit. Exhibits, at p. 98). Should the Central Trust Company fail seasonably or refuse to release such stocks or bonds, or both, by proper delivery of the certificates representing the stocks or of the bonds mentioned, then and in any such event sale or sales will be made under appropriate orders of the court. The sales and releases of stocks and bonds thus provided for shall be made free from every interest or claim of each of such railway companies and their respective stockholders and also of the Central Trust Company in both of its capacities as trustee” (R., 206-207).

Said order, after making certain provisions with reference to the time and manner of effecting the sales so ordered, proceeded:

“(b) In view of the state of the evidence respecting the sale of stocks and bonds mentioned in the last petition of the United States, *other than the particular stocks and bonds above ordered to be sold*, and of the absence of any showing of immediate necessity to pass upon the questions so involved, further consideration of those matters will be postponed; but any of the parties concerned shall have the right to take further evidence within a reasonable time and again to present the subjects, *not herein distinctly passed upon*, for the consideration and decision of the court” (R., 209). (Italics ours.)

The steps taken by the railroad companies to comply with the order last referred to appear in their petition and motion filed October 5, 1916 (R., 209-212); pursuant to which they submitted a contract, dated October 7, 1916 (R., 57-62), for the sale to Jones of the stock of the Buckeye and the stock and bonds of The Ohio Land & Railway Company. On October 7, 1916 the Court approved for entry an order finding

“that said purchaser is satisfactory to the court and that said sale complies with the order entered herein on May 19, 1916, and that the terms of the contract of sale are, and the amount of cash paid for said securities is, such as to fully protect the interests of Central Trust Company of New York, Trustee, and that the price proposed to be paid for said properties is the reasonable value thereof” (R., 213);

and then proceeding:

“It is ordered that said sale and the terms thereof as embodied in the contract now submitted to this court be and the same hereby are approved and that said Central Trust Company, Trustee, upon due application to it in accordance with the

terms of the First Consolidated Mortgage of the Hocking Valley Railway Company as provided in said contract, release said stocks and bonds from the lien of said mortgage upon the payment to it of the purchase price thereof.

"Approved for entry upon the dismissal of the appeal of the Central Trust Company from the order of May 19, 1916" (R., 213).

The appeal of Central Trust having been dismissed, the Court, on November 10, 1916, directed entry of the order approved on October 7, 1916 (R., 212).

The contract of October 7, 1916, thus approved by the Court below, contained the following recitals:

"(c) The Hocking Company heretofore acquired all said outstanding stock and bonds of the Ohio Company, and all said outstanding stock of the Buckeye Company, and thereupon duly pledged and deposited the same (except five shares of stock of each of said Companies held by directors thereof) under the First Consolidated Mortgage, dated March 1, 1899, made by the Hocking Company and the Buckeye Company to Central Trust Company of New York, Trustee, securing an authorized issue of \$20,000,000 of First Consolidated Mortgage Four and One-Half Per Cent. Gold Bonds of the Hocking Company, and said stock and bonds are now deposited with and held by said Trustee under said mortgage" (R., 58). . . .

"(f) By said First Consolidated Mortgage the Buckeye Company conveyed certain real estate in said mortgage described as further security for the payment of said First Consolidated Bonds of the Hocking Company and among other things agreed to pay to said Trustee thereunder a sum equal to two cents per ton on all coal mined from its property so mortgaged, to be applied in purchasing bonds secured by said mortgage" (R., 59).

It provided in part as follows:

"Fifth. The Hocking Company and the Chesapeake Company hereby waive and release any and all claims of every character or description against the Buckeye Company, the Ohio Company and the Purchaser or any of them by reason of any liability or claim which might be asserted by the Hocking Company, the Chesapeake Company, or either of them, against the Ohio Company or the Buckeye Company by reason of any matter or thing whatsoever occurring to the date of this agreement; except that nothing in this Article Fifth, or elsewhere in this Agreement contained is intended or shall be construed in any wise to limit or affect or impair the several covenants or obligations of the Buckeye Company contained in said First Consolidated Mortgage of the Hocking Company, and the Hocking Company and the Chesapeake Company respectively do not hereby waive or release the Buckeye Company, its successors or assigns from any such covenants and obligations. If the Hocking Company at any time defaults in the payments or other obligations imposed on it by said consolidated mortgage, and said mortgage is enforced or foreclosed in any way or to any extent, the Hocking Company agrees that it will cause all the property of the Hocking Company to be first exhausted before any recourse is had under said mortgage to the property of the Buckeye Company and agrees to indemnify and to save and hold harmless said Buckeye Company from any loss or damage to or payment by said Buckeye Company under the provisions of said mortgage, save only said two cents per ton royalty above-mentioned" (R., 60-61).

It is the mortgage lien and the 2 cent royalty provision mentioned in the above quotations that the appellants now seek to have cancelled (R., 11).

From the foregoing recital of the various proceedings before the Court leading up to, and in connection with, the sale to Jones of the Buckeye stock, certain salient facts are to be noted:

1. That the Court was from the first familiar with the relationships, both with respect to stock ownership and the mortgage lien, between the Hocking Valley, the Central Trust and the Buckeye (R., 124-125; 170-171).

2. That the Final Decree of March 14, 1914, so far as it dealt specifically with the coal properties, directed the sale only of the stock of the Sunday Creek Company of New Jersey (R., 177-9; 205-6).

3. That the Order of July 30, 1915, contemplated that the further proceedings on October 9, 1915, thereby directed, should cover all matters which required attention under the reservation of jurisdiction in the Final Decree.

4. That the Government's petition of October 9, 1915, filed in response to the order of July 30, 1915, and the Court's Order of May 19, 1916, thereon, which considered specifically the relations of the Hocking Valley and the Central Trust with the Buckeye and other companies, contemplated and directed, insofar as those relations were concerned, the sale only of the stock of the Buckeye and of the stock and bonds of the Ohio Land and Railway Company.

5. That the Order of May 19, 1916, reserved jurisdiction only of questions not connected with the specific matters dealt with therein, *i. e.*, the relationships exist-

ing between the Buckeye, the Ohio Land and Railway Company, the Hocking Valley and the Central Trust.

6. That although the Jones contract of October 7, 1916, made pursuant to the order of May 19, 1916, referred again to the provisions of the First Consolidated Mortgage of the Hocking Valley and the Buckeye, and expressly provided that the Buckeye should continue to observe and comply with these provisions, the Court "with full knowledge of the fact situation" (R., 113) approved the contract without qualification, and its order of approval contained no reservation of jurisdiction whatever.

We are not concerned upon the present appeal with the question whether the Court below has sufficiently reserved jurisdiction to make further orders, in so far as it may deem such orders necessary in connection with other relationships than those between the Hocking Valley, the Buckeye, and the Central Trust. We do contend that the Court has made it abundantly clear that, so far as the relationships between those companies are concerned, it intended, by the series of orders entered July 30, 1915, May 19, 1916 and November 10, 1916, to completely and finally dispose of the question of the dissolution of those relationships. The last of those orders remained in effect, unchallenged and unquestioned by anyone, for more than five years,—in other words, until the appellants' petition was filed on December 6, 1921 (R., 7). The term at which the order of November 10, 1916, was entered had then long since expired. All parties acquiesced in each of those orders with the single exception of the Central Trust, whose appeal from the

Order of May 19, 1916, was subsequently dismissed voluntarily (R., 34, 212).

(c) THE DECISIONS OF THIS COURT SUSTAIN OUR CONTENTION THAT THE LOWER COURT'S PREVIOUS ORDERS AFFECTING THE BUCKEYE CONSTITUTE A FINAL DECREE WHICH COULD NOT BE MODIFIED AFTER THE EXPIRATION OF THE TERM AT WHICH IT WAS ENTERED.

We have shown that the Order of May 19, 1916, and the confirmation of the sale made pursuant thereto, constituted a final adjudication of the matters before the Court. Nothing further remained to be done, nor did the Court retain any jurisdiction to do anything, with respect to the subject matter thereof. The action of the Court, as embodied in those orders, was a complete determination of the issues before it. That such a final determination, though made upon a matter distinct from the general subject of the litigation, is a final decree which cannot be annulled, enlarged or modified by the Court after the term at which it was entered has expired, is settled by the decisions of this Court.

Central Trust Co. v. Grant Locomotive Works,
135 U. S. 207.

See also

Keystone Manganese and Iron Company v. Martin, 132 U. S. 91.

McGourkey v. Toledo and Ohio Central Railway Company, 146 U. S. 536.

III.

The Court Below Properly Dismissed Appellants' Petition Because the Situation Therein Disclosed Involved No Violation of the Anti-Trust Act or of That Court's Final Decree.

But even if we assume that our conclusions set forth in Point II of this brief are open to question, and that it was still open to the Court below to consider the question whether the relationships between the Buckeye, the Hocking Valley and the Central Trust, not terminated by its prior orders, should be further interfered with, nevertheless the action of the Court in dismissing appellants' petition was clearly right because that petition disclosed no situation involving any violation either of the Anti-Trust Act or of the Court's final decree of March 14, 1914.

(a) THE OPERATION OF BITUMINOUS COAL MINES ON THE BUCKEYE LANDS IS AN INSIGNIFICANT PART OF THE HIGHLY COMPETITIVE BITUMINOUS COAL MINING INDUSTRY IN THE UNITED STATES; THE PROVISIONS OF THE CONSOLIDATED MORTGAGE RESPECTING THE BUCKEYE LANDS ARE TOO INCONSEQUENTIAL AND REMOTE TO CONSTITUTE A RESTRAINT OF TRADE OR A MONOPOLY UNDER THE ANTI-TRUST ACT.

The lands formerly owned by The Buckeye Coal and Railway Company, now owned by the appellant, The Sunday Creek Coal Company, and subject to the mort-

gage lien and the 2 cent royalty covenant, have an area of a little over 11,000 acres and contain a little over 18,500,000 tons of unmined bituminous lump coal (R., 248). It is a matter of common knowledge that 11,000 acres of coal lands form an insignificant portion of the total acreage of bituminous coal lands in the United States, or, for that matter, of the total acreage—100,000 acres—of coal lands involved in the combination against which the Decree of March 14, 1914 was directed (R., 172).

It is equally well known that 18,500,000 tons is an insignificant portion of the total tonnage of unmined bituminous coal in the United States. There were more than 460,000,000 tons of bituminous coal produced and more than 8,000,000 acres of bituminous coal land operated in the United States during the year 1919. In this same year there were 442,887 acres of bituminous coal land operated in Ohio alone, and 1,834,207 acres operated in West Virginia.

Fourteenth Census of the United States, 1920,
Volume XI, "Mines and Quarries, 1919",
pp. 274, 285.

The courts will take judicial notice of the foregoing official statistics.

State v. Barrett, 172 Ind. 169, 87 N. E. 7.

Chicago & A. R. Co. v. Baldrige, 177 Ill. 229,
52 N. E. 263.

State v. Braskamp, et al., 87 Iowa 588, 54 N.
W. 532.

23 C. J. 161, n. 80.

And this Court upon appeal can properly take judicial notice of any matter of which the court of original jurisdiction may properly take notice.

Pennington v. Gibson, 16 How. 65.

Varcoe v. Lee, 180 Cal. 338, 181 P. 223, 225.

These facts demonstrate that the relationships now existing between the Hocking Valley and the Buckeye are with respect to a negligible fraction of the bituminous coal industry. These indirect relationships impose and can impose no direct restraint upon even this negligible factor in the industry, an industry which the United States Coal Commission has reported to Congress to be in a highly competitive condition.

Final Report of the United States Coal Commission, dated September 22, 1923 (mimeograph), p. 13.

Appellants argue that the lien of the consolidated mortgage on the Buckeye lands created an interest of the Hocking Valley in the Buckeye properties which must be dissolved under the provisions of the Decree of March 14, 1914, and the Anti-Trust Act. They admit, however, that in view of the sound financial condition of the Hocking Valley, and in view of the contract of October 7, 1916, providing that in the event of foreclosure of the mortgage the Buckeye lands are not to be resorted to until after exhaustion of the Hocking Valley's properties (R., 61), the possibility of recourse to the Buckeye lands under foreclosure proceedings is **extremely remote** (Appellants' Brief, 28). The significance of this fact,

thus admitted by the appellants, was fully appreciated by the Court below. Referring to the Government's supplemental petition, that Court said:

" . . . it seems plain that even in view of the Reading decision the criticized situation is not so clearly improper, nor so substantial, as to justify the action which the Government now asks. Whatever theoretically potential interference with free competition might otherwise be created by the railroad-mortgage lien upon the Buckeye lands in connection with the royalty tonnage provision, we think such interference practically reduced to a minimum by the fact that by the contract between Jones and the railroad companies the railroad property must first be exhausted before resort can be had to the coal lands, in connection with the fact that no suggestion is made that the railroad property is not entirely adequate to meet the payment of the mortgage in full, and the payment of the mortgage puts an end to the royalty. Indeed, an affirmative inference, more or less strong, in favor of the adequacy of the railroad security seems fairly deducible from the record presented to us. We therefore think that it will be time enough to question the invalidity of the situation we are discussing when, if ever, it becomes acute.

"We are accordingly constrained to dismiss the Government's supplemental petition" (R., 114-115).

The interest of the Hocking Valley in the Buckeye by virtue of this lien is therefore of small practical importance, *first* because it involves only a negligible part either of the bituminous coal mining industry as a whole or of the field tributary to the Hocking Valley, and *second* because the interest itself is of the most remote and contingent character. Such a remote and contingent interest in such a negligible part of an industry is not a combination in restraint of trade or a monopoly under the Anti-Trust Act.

The decisions of this Court are uniform in holding that the Anti-Trust Acts are applicable only to such combinations as constitute an *undue* restraint of trade or commerce. It was definitely settled in *The Standard Oil Company of New Jersey et al. v. The United States*, 221 U. S. 1, that the "rule of reason" must be applied in construing the provisions of the Sherman Act and that the prohibitions imposed by the Act are directed against the *undue* limitation on competitive conditions caused by certain agreements or combinations, and not against any and all combinations or contracts which might be made concerning trade or commerce.

The Standard Oil Company of New Jersey et al. v. The United States, 221 U. S. 1, 58-61, 66.

If the "standard of reason" be applied to the present case, it is at once clear that the facts with reference to existing relationships between the Hocking Valley and appellants presented in the record and relied on by appellants, are utterly insufficient to show conditions which are within the prohibitions of the Anti-Trust Acts. That minor combinations or other relationships are properly disregarded in applying and enforcing the provisions of the Anti-Trust Acts, is definitely settled by recent decisions of this Court.

In *United States v. Union Pacific Railroad Company*, 226 U. S. 61, Mr. Justice Day said at p. 88:

"It is the *scope* of such combinations and *their power to suppress or stifle competition or create monopoly* which determines the applicability of the act." (Italics ours.)

In *Geddes et al. v. Anaconda Copper Mining Company et al.*, 254 U. S. 590, this Court held that the evidence

failed to show that the defendants constituted at the beginning of the suit such a combination in monopoly or restraint of interstate or foreign trade in copper as would justify granting an injunction under Section 16 of the Clayton Act, basing such conclusion on the absence of facts showing that the defendants controlled such a considerable part of the copper industry as to constitute a restraint of trade or monopoly in copper production in the United States. At pages 594, 595, the Court said:

“There is evidence that the total production of copper in the United States and Alaska, in 1899, was 581 million pounds, and of the Anaconda Company one million pounds, (probably an error, 100 million pounds being intended); but the total production of the world at that time is nowhere stated. The production in the United States in 1910, the year before the suit was brought, was 1,086 million pounds, and of this the Butte Camp, in which there were several mines other than those of defendants, produced 288 million pounds, or approximately 22 per cent. Here again there is no statement as to the total production of the world for that year.

“Whatever the fact may have been, it is obvious that from such evidence as this it is not possible to determine to what, if to any substantial extent, the defendants restrained or monopolized the production of copper in the United States, much less in the world.”

In *United States v. Reading Company et al.*, 253 U. S. 26, where this Court held that the relations between the Reading Company (a holding company), the Philadelphia & Reading Coal & Iron Company, the Philadelphia & Reading Railroad Company, the Central Railroad Company of New Jersey, and certain other defendants were such as to constitute a violation of the Anti-Trust Act,

and that the combination of these companies must be dissolved, the Government's bill had also sought the dissolution of a certain incidental relationship between the Lehigh Coal & Navigation Company, the Lehigh & Susquehanna Railroad Company and the Central Railroad Company of New Jersey. The facts with reference to this latter relationship and this Court's conclusion thereon are thus summarized in this Court's opinion, beginning at page 54:

"In 1871 the Navigation Company leased the Lehigh & Susquehanna Railroad, which it owned, to the Central Railroad Company, by an instrument containing a covenant which the Government claims requires the Navigation Company to ship to market over the leased line three-fourths of all of the coal which it should produce in the future. This covenant has been amended and supplemented by several agreements but not so as to essentially modify it with respect to the contention we are to consider.

"It is argued that this covenant necessarily imposed an undue restriction upon the Navigation Company in selecting its markets and in shipping its coal, in violation of the Anti-Trust Act.

"It is not entirely clear that the covenant will bear the restrictive interpretation as to shipments which the Government puts upon it, but, assuming that it may be so interpreted, nevertheless, the conditions and circumstances of the case considered, the result contended for cannot be allowed.

"When the lease was made, in 1871, the Central Railroad extended from Jersey City to its western terminus at Phillipsburg, New Jersey, and it was without access to the coal fields. The Lehigh and Susquehanna Railroad was about 100 miles in length and extended from Phillipsburg into the Wyoming field, where the Navigation Company owned extensive coal producing properties and mines. The lines of the two companies were

in no sense competitive, but, on the contrary, the Lehigh and Susquehanna line served as a natural extension of the Central Company's lines to the great tonnage producing coal districts. The rental to be paid was one-third of the gross earnings of the railroad and it was natural and 'normal' that the lessor should desire that the traffic should continue to be as large as possible. Plainly this covenant was not written with the purpose of suppressing interstate commerce and the history of its operation shows that, instead of suppressing it, it has greatly promoted it. The claim is quite too insubstantial to be entertained and the decree of the District Court with respect to it will be affirmed and the bill, as to it, dismissed."

In *United States v. Southern Pacific Company et al.*, 259 U. S. 214, where this Court held that the acquisition by the Southern Pacific Company of a controlling interest in the stock of the Central Pacific Railway Company, a normally competing road, constituted a combination made unlawful by the Sherman Act, there was a mortgage of the Central Pacific Railway Company secured by its property and guaranteed by the Southern Pacific Company which subordinated its lease of the Central Pacific properties thereto, with reference to which the Court said on page 241:

"We direct that a decree be entered severing the control by the Southern Pacific of the Central Pacific by stock ownership or by lease. But, in accomplishing this purpose, so far as compatible therewith, the mortgage lien asserted in the brief filed for the Central Union Trust Company shall be protected."

These authorities establish that remote and inconsequential combinations or relationships are not within the inhibitions of the Anti-Trust Act.

Appellants, however, strenuously contend that under the authority of this Court's decision in *Continental Insurance Company et al. v. United States, Reading Company, et al.*, 259 U. S. 156, the Court below should have ordered a dissolution of the existing relationships between the Hocking Valley and the appellants. They say, on page 26 of their Brief: "All the elements in the *Continental Co.* case that required dissolution of the combination there existing, obtain in the present case." This Court has well expressed the dangers inherent in following too meticulously decisions based on superficially similar facts and circumstances in applying the Sherman Act to a particular set of facts.

" . . . each case under the Sherman Act must stand upon its own facts, and we are unable to regard the decrees in the *Northern Securities Company* case and the *Standard Oil Company* case, as precedents to be followed now, in view of the different situation presented for consideration." (*United States v. Union Pacific Railroad Company*, 226 U. S. 470, 474).

In the light of the warning by this Court, just quoted, we now examine with some care the situation before the Court in the *Continental Insurance Company* case. The magnitude of the properties covered by the general mortgage of the Reading Company and the Philadelphia & Reading Coal & Iron Company, especially when considered in relation to the total amount of anthracite coal producing properties in the United States, presents a striking contrast to the small amount of bituminous coal properties involved in the present case. That this Court fully appreciated the importance of the comparative size

of the properties with which it was dealing in the *Continental Insurance Company* case, is shown by the facts to which it referred in its earlier opinion in *United States v. Reading Company et al.*, 253 U. S. 26. Among these facts were the following:

(1) Practically all of the anthracite coal in United States is found in northeastern Pennsylvania in three fields, viz.: the Wyoming field, containing about 176 square miles of coal; the Lehigh field, containing about 45 square miles; and the Schuylkill field, containing about 263 square miles of coal.

(2) The Schuylkill field has only two direct rail connections with the two great coal marketing centers, Philadelphia and New York, viz.: The Reading and the Pennsylvania Railroads.

(3) By 1891, in pursuance of its policy of attempting to gain control of the anthracite tonnage of the Schuylkill field, the Philadelphia & Reading Coal & Iron Company (the company whose properties were ordered withdrawn from the lien of the general mortgage in the *Continental Co.* case) owned coal lands comprising about 33 per cent. of the entire anthracite coal field of Pennsylvania and which contained over 50 per cent. of the entire anthracite coal deposits in the State remaining unmined.

United States v. Reading Company et al., 253
U. S. 26, 41, 42, 43-44.

These facts disclose an entirely different situation from that presented by the case here under consideration.

The *Reading* case involved a gigantic combination affecting the ownership, production and transportation of fifty per cent. of the anthracite coal reserves of this country. The coal properties involved in the General Mortgage with which this Court dealt in its later decision in the same case (*Continental Insurance Company et al. v. United States, Reading Company, et al.*, 259 U. S. 156) constituted one-third of the total security of the General Mortgage (259 U. S. 156, 167) and were a vital and essential part of the financial structure which the mortgage embodied. The relationships attacked in the present instance are quite different. They resemble the minor relationships between the Lehigh Coal & Navigation Company, the Central Railroad of New Jersey and the Lehigh & Susquehanna Railroad Company, which this Court held in the *Reading* case were too inconsequential to be considered. In point of fact they are absolutely and relatively much less important even than the relationships there disregarded.

We may observe also in passing that the *Reading* case certainly affords no precedent for the relief prayed by the appellants in the present case, that is, an entire release of their properties from the mortgage lien and covenants. The obligation of the coal companies in the *Continental Insurance Company* case was preserved to the full extent, the only feature terminated being the *joint* mortgage and the *joint* liability on the bonds for which there were substituted several liabilities of the railroad company and the coal company, with adequate provisions for the protection of the bondholders secured by the mortgage.

In the *Continental Insurance Company* case, this Court expressly declared its disinclination to

“vary the security of the bondholders more than seems necessary to effect fully the purpose of the law.”

Continental Insurance Company v. United States, Reading Company, et al., 259 U. S. 156, 173.

We respectfully submit that in effecting fully the purpose of the Anti-Trust Law with respect to the combination condemned by the decree of March 14, 1914, there is no necessity of withdrawing from the lien of the consolidated mortgage or from the royalty provisions thereof the insignificant acreage of the Buckeye lands.

(b) APPELLANTS' CLAIM THAT THE MORTGAGE LIEN AND THE ROYALTY COVENANT CONSTITUTE INDUCEMENTS TO DISCRIMINATION IN APPELLANTS' FAVOR IS FRIVOLOUS, AND IN ANY EVENT CANNOT BE URGED BY APPELLANTS AS A BASIS FOR INJUNCTIVE RELIEF UNDER THE ANTI-TRUST ACT.

Appellants assert in their petition (R., 10) that the existence of the 2 cent royalty covenant and the mortgage lien constitute a strong inducement to the Hocking Valley to discriminate in appellants' favor by furnishing better service to the Buckeye mines than to other mines situated along its railroad, and that this relationship should be terminated in order to remove the danger of such discrimination. We think the Court will not be impressed by this argument. It is, in substance, that this Court should relieve appellants from obligations which they have deliberately assumed and which, as we show

hereafter, (pp. 50-58) constituted the principal consideration for the conveyance of the Buckeye properties to that company, in order that appellants may not yield to the temptation to accept discriminations, the receipt of which, they argue, would be unlawful and would tend to establish a combination and monopoly in violation of the Anti-Trust Acts. We submit that it does not lie in the mouths of appellants thus to plead their own susceptibility to unlawful inducements as a justification for the release to them, without consideration or upon inadequate consideration, of the valuable Buckeye property. Surely the public interest does not require this sacrifice of the bondholders' security to the appellants' frailty. The public is adequately protected by Federal and State laws which forbid, and provide for the punishment of, such discrimination, should it ever occur.

Besides, the appellants' petition (R., 11) prays

"that proper orders may be entered in this cause, *enjoining* any demand or collection of said two cents per ton mentioned in said Section 9 of Article 2 of said mortgage." (Italics ours.)

Such injunctive relief could not be sought by appellants in a separate proceeding for such an injunction under the Anti-Trust Act. Section 16 of the Clayton Anti-Trust Act, 38 Stat. L. 730, provides:

"That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision or other jurisdiction of the Interstate Commerce Commission."

Discrimination by common carriers in favor of shippers is one of the matters with respect to which jurisdiction is given to the Interstate Commerce Commission.

Interstate Commerce Act, Section 1, paragraph 14; Section 3, paragraph 2; Section 4; Section 6, paragraphs 3 and 10; Section 9; Section 12, paragraph 1.

See also

Elkins Act, 34 Stat. L. 584, Section 1.

The appellants' present petition is, in substance and effect, an attempt themselves to bring suit for an injunction in respect of a situation which they claim will result in unlawful discriminations or preferences in their own favor as shippers. Section 16 of the Clayton Anti-Trust Act, above quoted, would seem to forbid their prosecuting any such suit and, we respectfully insist, likewise precludes their seeking similar injunctive relief by an intervening petition in this cause.

(c) THE DECREE OF MARCH 14, 1914 WAS FRAMED TO DISSOLVE ONLY THOSE RELATIONSHIPS WHICH OPERATED TO CREATE A MONOPOLY OR RESULTED IN UNDUE RESTRAINT OF TRADE AND THAT DECREE DID NOT REQUIRE OR CONTEMPLATE THE ACTION PRAYED FOR BY THE APPELLANTS.

Appellants also seem to argue (Brief, pp. 8-9, 23-25) that the principle of complete separation of the railroad and coal properties is inherent in the Decree of March 14, 1914, and has therefore so far become the law of this case as to require the cancellation of the 2 cent royalty

covenant and the removal of the lien of the Consolidated Mortgage from the Buckeye lands, even though, if those relationships were now to be examined as an original question, they might not be held to constitute either a combination in restraint of trade or a monopoly. We insist that there is nothing in the relations now existing between the Hocking Valley and the Buckeye which can with any degree of fairness or reasonableness be said to violate either the spirit or the letter of that Decree. It is perfectly clear that the purpose of the Decree was to destroy those conditions and only those conditions which constitute a violation of the Anti-Trust Acts. In its reservation of jurisdiction (quoted *supra*, p. 22) the lower Court retained jurisdiction for the purpose of making

“such other and further orders and decrees as may be *necessary* to the due execution of this decree and the complete dissolution of the combination and monopoly herein condemned.” (Italics ours).

In its opinion refusing to approve the sale of the Buckeye stock to Poston, filed July 30, 1915, the Court said (R., 184; Appellants Brief, 5):

“We cannot too often repeat that the prime purpose of our decree was to insure the complete separation of the railroad interests from the coal mining interests, *so that the former should not and could not dominate the latter.*” (Italics ours).

We submit that the Court which made that decree is best fitted to interpret and apply it. It has been shown (*supra*, pp. 18-28; 30-31) that that Court has consistently refrained throughout this litigation, and with full knowledge of the mortgage situation, from disturbing the relationships between the Hocking Valley and the Buckeye

property created by the Consolidated Mortgage. It has stated in its opinion on the granting of the order here appealed from, that this relationship is not substantial enough to justify relief under the original decree. It has always treated that relationship as one created and existing primarily and principally for the benefit of the holders of the Consolidated Mortgage bonds, whose interests the Court has at all times been alert to protect. In this it has followed strictly the principles laid down in similar cases by this Court.

Continental Insurance Company et al. v. United States, Reading Company, et al., 259 U. S. 156, 173.

United States v. Southern Pacific Company et al., 259 U. S. 214, 241.

IV.

The Court Below Properly Dismissed Appellants' Petition Because to Have Granted the Relief Therein Prayed Would Have Been Manifestly Inequitable.

We have shown, *first*, that the present appeal must be dismissed because appellants have no standing to prosecute it, *second*, that the Court below properly dismissed appellants' petition inasmuch as that petition sought a modification of a final decree which that Court was without jurisdiction to grant, and, *third*, that the situation disclosed in appellants' petition involved no violation of the Anti-Trust Act or of the final decree of March 14, 1914.

But suppose, for the purpose of the present argument only, we concede (a) appellants' standing to appeal, (b) the jurisdiction of the Court below to grant the requested modification of its previous decree, and (c) that the petition disclosed at least a technical violation of the Anti-Trust Act of which appellants were competent to take advantage in their private interest. Nevertheless, the Court below was clearly right in dismissing the petition because of the inequitable results which would necessarily have followed the granting of appellants' prayer.

(a) APPELLANTS' DEMAND THAT THE BUCKEYE PROPERTY BE RELEASED FROM THE MORTGAGE EITHER FOR NO CONSIDERATION OR FOR AN INADEQUATE CONSIDERATION IS INEQUITABLE.

The opinion of the Court, quoted in full above, said in part:

"It will be observed that the substantial difference between the petitions of the Coal Companies and the Government, respectively, is that the one asks such release without, and the other upon, compensation to the mortgage trustee. . . . Again, this is a proceeding in equity, and it is manifestly inequitable that either Jones or those standing in his right escape liability for a situation assumed by them, and, as we must find, then recognized as of binding force, and whose assumption seems fairly to have been part of the consideration paid by Jones for the Buckeye stock. In the situation presented, we think the petitioning coal companies cannot be heard to say that payment of the royalty, or the continuance of the mortgage lien upon the lands of the Buckeye Company, would violate the law. The fact that the Government did not answer or take issue upon the coal companies' petition

cannot alter the result otherwise reached. The petition of the coal companies must be denied" (R., 113-114).

In their brief (pp. 20, 34), appellants take exception to the above characterization of their petition as compared with that of the Government. They seem to contend that the prayer of their petition is not substantially different from the prayer of the Government's supplemental petition of November 21, 1922. Passing over appellants' argument at pages 41 to 43 of their main brief which certainly seems to justify the lower Court's characterization of their purpose, some light is thrown on this question by reference to the prayers of the two petitions and to appellants' answer to the supplemental petition.

The prayer of appellants' petition is as follows:

"WHEREFORE your petitioners pray that proper orders may be entered in this cause, enjoining any demand or collection of said two cents per ton mentioned in said Section 9 of Article 2 of said mortgage, decreeing that all the lands of said Buckeye Company be released and eliminated from said mortgage and particularly from said Section 9 thereof, or that all interest or interests of said railway company and said trust company in said property be sold or such other and appropriate order herein as will effectively carry out the purpose and effect of the main decree entered herein" (R., 11).

The prayer of the Government's petition, so far as material, is as follows:

"2. That defendants, The Hocking Valley Railway Company and The Central Union Trust Company of New York, trustees, be required to release the above described coal lands from the

lien of said Hocking Valley first consolidated mortgage, and to release The Buckeye Coal & Railway Company from its obligations under Section 9 of said mortgage upon payment by said Buckeye Company, or its successors in interest to The Central Union Trust Company of the reasonable value of the rights of said trustee thus to be relinquished" (R., 71).

Appellants' answer to the Government's petition contains the following:

"10. These respondents, however, insist that relief should be granted upon the two petitions now before the court according to the prayer of the petition of these respondents, and not according to the prayer of the supplemental petition filed by complainant. The relief prayed for in said petition of respondents is in strict accord and harmony with the main decree entered in this cause, and with all subsequent proceedings in this cause. The prayer of complainant's said supplemental petition asks that this court change its theory of this whole case, and asks that these respondents now pay for the total value of said Buckeye Company lands and also the two-cent royalty upon the indebtedness to secure which said mortgage was given to the Central Union Trust Company" (R., 75-76).

The same claim is elaborated in the paragraph of the answer which follows the passage just quoted (R., 76).

It is apparent from the foregoing that appellants themselves recognize a very substantial difference between the prayer of the Government and their own prayer, and that the thing to which they took exception in the relief asked by the Government was the fact that it contemplated that the mortgage trustee should be reasonably compensated for the security with which it was to be required to part. We leave it to counsel for ap-

pellants to explain whether the ground of their objection to the Government's petition was the fact that it provided for *adequate* compensation or the fact that it provided for any compensation *at all*. For the purpose of our present argument, it is immaterial whether appellants sought to compel the release of the mortgage security for an inadequate consideration or for no consideration whatever. Either result would be inequitable and contrary to the settled rule of this Court.

Continental Insurance Company et al. v. United States, Reading Company, et al.,
259 U. S. 156, at p. 173;

United States v. Southern Pacific Company,
259 U. S. 214, at p. 241.

(b) THE PROVISIONS OF THE CONSOLIDATED MORTGAGE WHICH APPELLANTS ATTACK MERELY PROVIDE FOR, AND SECURE PAYMENT BY THE BUCKEYE AND ITS SUCCESSORS OF, THE PORTION NOT INITIALLY PAID BY IT OF THE PURCHASE PRICE OF ITS PROPERTIES.

The Buckeye acquired its properties at the time, and as a part, of the Hocking Valley Reorganization of 1899 (R., 170-171). That reorganization was the outgrowth of the insolvency and receivership of the Columbus, Hocking Valley & Toledo Railway Company. The receivership, originating in a general creditors' suit, was continued in connection with foreclosure suits upon three mortgages: (1) a joint mortgage of the Columbus, Hocking Valley & Toledo Railway Company and the Hocking Coal & Railroad Company, dated October 1, 1881, and securing an issue of Five Per Cent. Bonds, executed by the Railway Company only; (2) a joint mortgage,

dated August 1, 1884, by said two companies to secure an issue of Six Per Cent. Joint Bonds of both companies, and (3) a mortgage, dated October 1, 1896, executed, and securing bonds issued, by the Railway Company only (R., 13, 233). All three mortgages were in default and were foreclosed or cut off in the proceeding reported in 87 Fed. 815, under the title "*Central Trust Co. of New York v. Columbus, H. V. & T. Ry. Co., et al.*" (R., 222-242). The opinion of Circuit Judge Lurton, later a member of this Court (R., 222-242), decided, among other things, that the two joint mortgages were not *ultra vires* the coal companies. The decree of foreclosure and sale entered May 24, 1898 (R., 242), declared that the mortgage of October 1, 1881, was a valid and subsisting mortgage and directed the sale of mortgaged properties. The properties of the Coal Company so ordered to be sold were the same as those of the Buckeye included in the First Consolidated Mortgage of the Hocking Valley and the Buckeye, dated March 1, 1889 (R., 242). The decree of May 24, 1898, fixed an upset price upon the railway properties of \$3,250,000 and upon the coal property of \$750,000, if offered as separate parcels, and an upset price upon the two properties, if offered as one parcel, of \$4,000,000.

The two properties were purchased as one parcel by Melville E. Ingalls, Jr., and George E. Gardiner, for \$4,000,001 and the sale was duly confirmed. Ingalls and Gardiner, of course, acted for the creditors in making this purchase, and it was made as a step in the Reorganization. As a further step a new coal company, the Buckeye, and a new railroad company, the Hocking

Valley, were organized (R., 169, 171). Thereupon, under date of February 25, 1889, Ingalls and Gardiner offered to convey to the Buckeye the coal lands and other property purchased by them under the foreclosure decree, in consideration of the payment by the Buckeye of \$25,000 in cash and of the delivery by it of 2,250 full paid shares of its capital stock. This offer (R., 53-55) also contained, among others, the following provisions:

“ . . . it being understood that . . . your company will fully carry out in all respects a certain plan and agreement for the reorganization of the Columbus, Hocking Valley and Toledo Railroad Company, dated January 4, 1899, to which reference is hereby made; and as a special consideration for said conveyance and transfer that your company will mortgage its said lands and appurtenances hereby agreed to be conveyed to it by us as security for the bonds of The Hocking Railway Company to be issued under said plan.”

The Buckeye duly accepted this offer (R., 55-56), signed a formal contract agreeing to join in the new mortgage of the Hocking Valley (R., 45-48) and signed and accepted a deed incorporating the same provisions (R., 48-53). Property for which the purchasers or their constituents had paid approximately \$750,000 was thus immediately conveyed to the Buckeye for \$25,000 in cash and \$225,000 in stock and in consideration of the covenant to mortgage. The discrepancy between the cost to the purchasers and the consideration received in cash and stock must have been supplied by the agreement to mortgage. The facts admit of no other explanation.

Under date of March 1, 1899, the Buckeye joined with the Hocking Valley in executing the First Consolidated

Mortgage to Central Trust Company as Trustee, securing an authorized issue of \$20,000,000 of First Consolidated Mortgage 4½% bonds. These bonds were signed only by the Hocking Valley. The mortgage recited the acquisition by the Buckeye of the properties conveyed by the deed of February 25, 1899, the resolutions of the Buckeye stockholders and directors authorizing the execution of the mortgage substantially in the form submitted at their respective meetings, and that the mortgage itself was substantially of the tenor of the drafts submitted to and approved by the stockholders and directors of both the Hocking Valley and the Buckeye (R., 15-17). Section 9 of Article Two of the mortgage contains the following provisions:

"Sec. 9. On July 1st, 1900, and on or before July 1st, in each and every year thereafter, the Coal Company shall deliver to the Trustee a statement in writing showing the amount of coal mined from lands owned by the coal company and mortgaged hereunder, during the year ending with the 1st day of March next preceding the date of such statement, and simultaneously it shall pay to the trustee hereunder a sum equal to two cents per ton on all coal so mined during such next preceding year.

"All sums so received by the trustee shall by it be used and applied in purchasing bonds hereby secured, in such manner as to it shall seem best, and at such prices as it shall seem best, not exceeding the rate of one hundred and five per centum and accrued interest. All such bonds when so purchased shall be cancelled. All sums so received by the trustee and not by it so used within six months from its receipt thereof, shall be returned to the coal company." (R., 8-9.)

The following facts make it clear why this Sinking Fund provision was inserted and why it fixed the amount to be paid at 2 cents per ton: The coal lands acquired and originally mortgaged by the Buckeye comprised 10,015.51 acres (R., 53). This acreage was about seven-eighths of that owned on June 7, 1923 (R., 248). Prior to Jones' purchase of the Buckeye stock, \$134,000 of bonds were retired by the sinking fund (R., 198, 102). An approximate estimate of the unmined tonnage in the original Buckeye lands on March 1, 1899, is readily made as follows:

Tonnage mined before 1916	$\frac{134,000}{.02}$	= 6,700,000 Tons
Tonnage mined 1916-1923 (R., 249).....	3,741,187	“
Tonnage unmined as of June 7, 1923 (R., 248)	18,662,375	“
	<hr/>	
	29,103,562	
Less $\frac{1}{8}$ account tonnage contained in property acquired after March 1, 1899	3,637,945	
	<hr/>	
Unmined tonnage as of March 1, 1899....	25,465,617	
Royalty at \$.02 per ton on which would yield	\$509,312.34.	

We think the reason for the incorporation of the 2 cent royalty provision is now reasonably evident. It was designed to refund to the Consolidated Mortgage the approximate amount of the purchase price of the Buckeye properties over and above the amount paid in cash and in capital stock, *i. e.*, \$500,000. We may further assume that the Buckeye stock (all of which the Central Trust received as Trustee, R., 192-195) was supposed to represent the approximate residual value of the surface lands and that the Sinking Fund provision was designed

to take care of the exhaustible elements in the value of the security represented by the coal in the ground. Whether this process of reasoning was actually pursued by the purchasers and the organizers of the Buckeye Company, we have no means of knowing. But the fact is clear beyond controversy that the amount which the Buckeye would be required to pay under the Sinking Fund provision was approximately the actual cost to the Purchasing Committee, in excess of the stock and cash received, of the lands which the Committee conveyed to the Buckeye. This portion of the purchase price was charged upon the land and was to be paid only as realized when the coal was removed. Pending payment the mortgage lien was security that payment would be made.

The Buckeye duly observed its obligations up to and including part of the year 1916 (R., 248), and the Sinking Fund had provided for the retirement, over this period, of \$134,000 of bonds. In other words, the process of payment for its lands by the Buckeye had proceeded, up to that time, as contemplated by the mortgage. It then became necessary for the Hocking Valley and the Central Trust, under the orders of the Court below, to dispose of the Buckeye stock and of the Ohio Land & Railway securities which constituted a part of the mortgage security. To this end the contract with Jones, dated October 7, 1916, was entered into. That contract recited:

“(c) The Hocking Company heretofore acquired all said outstanding stock and bonds of the Ohio Company, and all said outstanding stock of the Buckeye Company, and thereupon duly pledged and deposited the same (except five shares of

stock of each said Companies held by directors thereof) under the First Consolidated Mortgage, dated March 1, 1899, made by the Hocking Company and the Buckeye Company to Central Trust Company of New York, Trustee, securing an authorized issue of \$20,000,000 of First Consolidated Mortgage Four and One-Half Per Cent. Gold Bonds of the Hocking Company, and said stock and bonds are now deposited with and held by said Trustee under said mortgage. . . .

“(f) By said First Consolidated Mortgage the Buckeye Company conveyed certain real estate in said mortgage described as further security for the payment of said First Consolidated Bonds of the Hocking Company and among other things agreed to pay to said Trustee thereunder a sum equal to two cents per ton on all coal mined from its property so mortgaged, to be applied in purchasing bonds secured by said mortgage” (R., 58-59).

It provided in part:

“Fifth. The Hocking Company and the Chesapeake Company hereby waive and release any and all claims of every character or description against the Buckeye Company, the Ohio Company and the Purchaser or any of them by reason of any liability or claim which might be asserted by the Hocking Company, the Chesapeake Company, or either of them, against the Ohio Company or the Buckeye Company by reason of any matter or thing whatsoever occurring to the date of this agreement; except that *nothing in this Article Fifth, or elsewhere in this Agreement contained is intended or shall be construed in any wise to limit or affect or impair the several covenants or obligations of the Buckeye Company contained in said First Consolidated Mortgage of the Hocking Company, and the Hocking Company and the Chesapeake Company respectively do not hereby waive or release the Buckeye Company, its suc-*

cessors or assigns from any such covenants and obligations. If the Hocking Company at any time defaults in the payments or other obligations imposed on it by said consolidated mortgage, and said mortgage is enforced or foreclosed in any way or to any extent, the Hocking Company agrees that it will cause all the property of the Hocking Company to be first exhausted before any recourse is had under said mortgage to the property of the Buckeye Company and agrees to indemnify and to save and hold harmless said Buckeye Company from any loss or damage to or payment by said Buckeye Company under the provisions of said mortgage, *save only said two cents per ton royalty above-mentioned*" (R., 60-61). (Italics ours.)

When Jones acquired the stock of the Buckeye, he fell heir to its obligations under the mortgage. He did more—he expressly recognized their binding force in his contract. We submit that no court of equity could, for a moment, think of permitting him or his successors to advance any interpretation of that contract, or urge any ground of invalidity thereof or of the mortgage, which would enable him now to retain the benefits and, at the same time, repudiate the burdens of either instrument.

(c) THE APPELLANTS' ARGUMENTS ADVANCED TO JUSTIFY THEIR CLAIM THAT THE MORTGAGE LIEN AND SINKING FUND COVENANTS SHOULD BE TERMINATED ARE FRIVOLOUS.

In their effort to avoid these necessary equitable consequences of the arrangement which Jones entered into, counsel for appellants now advance three arguments:

1. That the 2 cent royalty provision was not specifically referred to in the Plan of Reorganization, nor in the

purchasers' offer, nor in the contract and deed made pursuant thereto, nor in the resolutions of the Buckeye stockholders and directors, and that therefore the Sinking Fund was probably inserted in the mortgage subsequently to these proceedings and was an after-thought (Appellants' Brief, 29-31).

2. That at the time it accepted the purchasers' offer and joined in the agreement and deed and executed the mortgage, the Buckeye was controlled and dominated by the Hocking Valley and was therefore compelled to enter into the contract without any exercise of independent judgment by its officers (Appellants' Brief, 9, 41).

3. That at the time he entered into the contract of October 7, 1916, Jones believed the mortgage lien and the royalty provision of the mortgage to be invalid, both for the reasons just mentioned and because of inherent illegality, and that the language above quoted from the contract of October 7, 1916, was intended to reserve these questions of invalidity as open questions to be determined later in such manner as might seem best (Appellants' Brief, 10-11, 19, 35).

The frivolous nature of these arguments we now proceed to point out.

1. The offer of the purchasers, and the agreement and deed entered into by the Buckeye with the purchasers pursuant thereto, did not undertake to define any of the terms of the proposed mortgage. The provision in the offer read merely as follows:

"It being understood . . . and as a special consideration for said conveyance and transfer that

your company will mortgage its said lands and appurtenances hereby agreed to be conveyed to it by us as security for the bonds of The Hocking Railway Company to be issued under said plan" (R., 54-55).

The agreement and deed provide as follows :

"When and as requested by the Purchasers or by their assigns (either individual or corporate), by them from time to time designated, the Company (the Buckeye) will make, execute, and deliver, or will join with the Purchasers or their assigns in making, executing and delivering a mortgage or deed of trust, granting, conveying and pledging said real estate, lands and tenements and the rents, issues and profits thereof, as security for the payment of the bonds issued or to be issued by the purchasers or their assigns for the agreed principal sum of twenty million dollars (\$20,000,000)," etc. (R., 46, 49).

Under these covenants any mortgage of the railroad and coal properties, containing usual and customary provisions proper for the security of the bonds, might be tendered by the purchasers or their assigns and the Buckeye would thereupon be obligated, by the express terms of its agreements and by the conditions of the deed, to join in the execution thereof. The mortgage, when executed, contained recitals that at a meeting of the stockholders of the Buckeye, held on the 25th day of February 1899, resolutions were adopted by the affirmative vote of all such stockholders, consenting to and approving the execution of an indenture, substantially in the form of the mortgage, as additional security for the bonds of the Hocking Valley thereby secured, and that at a meeting of the Board of Directors of the Buckeye

held on the same day resolutions were adopted authorizing the president and secretary of the company, in its behalf and under its corporate seal, to execute and to deliver to the Central Trust, a mortgage or deed of trust, to be known as the First Consolidated Mortgage, substantially of the tenor of the draft submitted at said meeting, upon the real estate, lands and tenements acquired from the purchasers. Said mortgage further recited that it was substantially of the tenor of the draft thereof submitted to and approved by the stockholders and directors of the Buckeye. These recitals were adopted by the Buckeye when it executed the mortgage under its corporate seal. By such execution they became the representations of the Buckeye to every holder, present or future, of any of the bonds thereby secured and the Buckeye and its successors in interest were estopped thereafter to deny them.

*Bronson et al. v. La Crosse and Milwaukie
Railroad Company et al.*, 2 Wall. 283.

Only a few of the provisions of the mortgage are included in the Record, (pp. 215-219) but it is alleged in the answer of the Central Trust Company to the appellants' petition, (R., 30), that the mortgage contained various and sundry other covenants to be performed by the mortgagors, and this allegation is not denied in the reply of the appellants, their denials (R., 42-43) being limited to the effect or meaning of the mortgage and the conclusions to be drawn therefrom. Such provisions, of course, included provisions defining the events upon which foreclosure proceedings or other remedies could

be brought or enforced, provisions for the sale of the mortgaged properties, provisions for the release of properties from the mortgage when no longer necessary for the use of the mortgagor companies, provisions for maintenance and insurance, and all the multitude of other provisions customary in corporate mortgages. None of these various provisions was referred to in the offer of the purchasers or in the agreement and deed executed pursuant thereto. Yet there can be no question that the Buckeye became bound by each and all of them. The provision for the Sinking Fund was of the same nature. Sinking fund provisions are usual, indeed well-nigh universal, in mortgages of coal properties and the appellants' attempt to claim that the incorporation of such a provision in the Consolidated Mortgage involved, in any way, a departure from the intent of the purchasers' offer and of the agreement and deed pursuant thereto, is unworthy of serious consideration.

And even if the argument could plausibly be made that those who originally organized the Buckeye and entered into the agreement and deed under which it acquired its properties were not on notice of, and did not foresee, that a sinking fund provision would be incorporated in the Consolidated Mortgage, this argument is certainly not available to Jones or to anyone who stands in his right. The contract under which he acquired his interest in the Buckeye properties, and with notice of which his successor in interest, the appellant Sunday Creek Coal Company (R., 11, 252), derived its title, specifically referred both to the mortgage lien and to the Sinking Fund provision, and, as we presently show, specifically obligated Jones and his successors to the observance thereof.

2. Appellants' suggestion that the Buckeye was in some way coerced by the Hocking Valley to enter into the mortgage, to the disadvantage of the Buckeye, is equally baseless. The terms of the offer were defined by the purchasers and were made pursuant, not to any direction or request of the Hocking Valley, but to the provisions of the Plan of Reorganization in which both the Hocking Valley and the Buckeye had their origin. Both the Buckeye and the Hocking Valley alike became obligated, by the very terms by which they acquired their properties, to join in the mortgage in the form in which it was proposed to them. The proposal was made by those who had acquired the properties purchased by them to be vested in the two companies organized to carry out the plan, and the obligations arose as an incident to, and a condition of, the conveyance to those companies of their respective properties. The creditors who effected the reorganization and who had acquired the properties had an absolute right to determine the terms upon which these properties were to be vested in the resulting corporations. Neither company was an instrument of the other. Both were instrumentalities created for the purpose of carrying out the reorganization. Their properties were vested in them upon terms and conditions prescribed by those who had the sole right to prescribe such terms and conditions. The consideration given by the Hocking Valley for its properties was the execution of the Consolidated Mortgage, the issue of bonds thereunder, the issue of other securities provided by the plan and the assumption of the obligations imposed upon the property vested in it by the Court directing the foreclosure. The consideration given by the Buckeye

consisted of 2,250 shares of its capital stock and \$25,000 in cash and the assumption of the obligations provided by the foreclosure decree and by the Consolidated Mortgage. These were the conditions upon which it acquired its property and they were the conditions with which it must comply if it was to retain title thereto. They were not imposed by the Hocking Valley, and they inured to the benefit of the bondholders who, or their predecessors in interest, purchased the coal and railway properties and who were entitled to fix the terms on which those properties were disposed of.

3. Most specious of all is the remarkable claim advanced by appellants that the effect of the contract of October 7, 1916 was to reserve, as between Jones and the other parties to that contract, the question whether the Buckeye was bound by the mortgage lien and by the 2 cents per ton royalty provision. The Court need only read the contract provisions above quoted to see that what appellants say is not so. The contract recites that the Buckeye mortgaged certain real estate as further security for the payment of the First Consolidated Bonds of the Hocking Valley and agreed to pay to the mortgage trustee 2 cents per ton on all coal mined from its property so mortgaged. Article Fifth of Jones' contract contains a release of liabilities which might be asserted by the railroads against the Ohio Company or the Buckeye Company

"except that nothing in this Article Fifth or elsewhere in this Agreement contained is intended or shall be construed in any wise to limit or affect or impair the several covenants or obligations of the Buckeye Company contained in the First Consoli-

dated Mortgage of the Hocking Company" (R., 60-61)

and provides that the railroads did not release the Buckeye, its successors or assigns, from any such covenants or obligations. There is also an indemnity against foreclosure and against loss or damage under the mortgage "save only said two cents per ton royalty above mentioned."

The contract and its recitals bind Jones and his successors as well as the railroads. The contract suggests no doubt or question as to the absolute obligation of the Buckeye to comply with the mortgage, including the Sinking Fund provision. On the contrary, language could not more clearly indicate the plain intention of the parties that the mortgage covenants, and specifically the Sinking Fund provision, were to be observed and complied with by the Buckeye. The indemnity against foreclosure merely recognized the principle of marshalling assets which the courts would apply in the absence of the indemnity clause. Under the contract Jones became the sole stockholder of the Buckeye. He later organized and became sole stockholder of the Sunday Creek Coal Company (of Ohio), the other appellant herein, to which the Buckeye stock and properties were alike transferred (R., 249-253). Jones' obligations thus became and are the obligations of the Sunday Creek Coal Company. It would be highly inequitable to allow him or these instrumentalities of his now to repudiate them.

Besides, appellants have already undertaken to litigate their liability under the mortgage and under the Sinking Fund provision thereof. The outcome of that litigation is in evidence in the form of a certified copy of

the record in *Buckeye Coal & Railway Company v. Central Union Trust Company of New York, et al.*, abstracted in the present Record (R., 246-247). Appellants have formally admitted (R., 249) for the purpose of this appeal that in said cause there was an issue between appellants and appellees as to the validity of the First Consolidated Mortgage and the covenants of the Buckeye therein "including the matters and things now set up in respect thereof in the petition of the appellants herein filed December 6, 1921." The Court of Common Pleas of Perry County, Ohio, and later the Court of Appeals of said County, after trials upon the merits, ordered, adjudged and decreed that the First Consolidated Mortgage and the covenants of the Buckeye therein contained were valid and binding obligations and a good and valid lien upon the real property in the mortgage described. The Supreme Court of Ohio declined to review that record. That decision is *res adjudicata* of appellants' present contentions as to the invalidity, as between the appellants and the Hocking Valley and Central Trust, of the mortgage lien and of the mortgage covenants.

(d) THE PURCHASE PRICE PAID BY JONES FOR THE BUCKEYE STOCK WAS OBVIOUSLY FIXED IN CONSIDERATION OF THE EXISTENCE OF THE MORTGAGE LIEN.

The purchase price paid by Jones under the contract of October 7, 1916 for the Buckeye stock was \$50,000. The sale of the stock at this price was approved by the Court below (R., 212-213). Its order found

"that the terms of the contract of sale are, and the amount of cash paid for said securities is, such as to fully protect the interests of Central Trust

Company of New York, Trustee, and that the price proposed to be paid for said properties is the reasonable value thereof."

It is beyond the bounds of reason to suppose that this nominal purchase price was fixed by the parties or was approved by the Court except in the light of the fact that Central Trust, as Trustee, retained its lien upon the Buckeye properties and the benefit of the royalty provision.

Appellants pretend in their brief (Appellants' Brief, 7, 45) that the purchase price was small because the Buckeye property was encumbered by a lease to the Sunday Creek Coal Company (formerly Sunday Creek Company). That lease is not in this Record and the Court will not speculate as to its terms. Such lease may as well have been an additional element of value to the stock as the contrary. As it was held by the Sunday Creek Coal Company, all of whose stock was owned by Jones, the purchaser of the Buckeye stock (R., 252), the circumstance of the lease could not have worried Jones seriously. Anyway, it is alleged in the answers of the Hocking Valley and the Central Trust (R., 80, 96), and is nowhere denied, that said lease was forfeited in 1916, the year in which the contract with Jones was made.

(e) THE APPELLANTS' UNCONSCIONABLE CLAIM WAS CORRECTLY CHARACTERIZED BY THE COURT BELOW.

Stripped of verbiage and sophistry, appellants' purpose is perfectly clear. Appellants acquired the Buckeye properties subject to an obligation to refund to the trustee for the bondholders, who had purchased and vested those properties in the Buckeye, the approximate amount

of the unpaid balance of the actual cost thereof to the bondholders. The time of payment of this unpaid balance was deferred until the Buckeye and its successors could realize, out of the coal in the properties, amounts sufficient to discharge it. Appellants now seek to repudiate that obligation and to violate the terms of the grant under which they hold, while still retaining its benefits. They affect to believe that for \$50,000 their *alter ego*, Jones, acquired an unencumbered title to 11,000 acres of land containing 18,500,000 tons of unmined coal. They have sought to carry their unconscionable claim first into the Ohio State Courts and, failing there, before the Circuit Judges in the anti-trust case. In each instance their claim has been denied in terms which leave no doubt of the opinion of these courts as to its inequitable character. They now, upon the pretext of protecting the public interest, seek to bring the question before this Court, in which, as we have shown, they have no standing. Their efforts are correctly characterized by the Court below in the extract from its opinion which we quote at the head of this Point IV of our argument (*supra*, p. 48). We repeat it here:

" . . . this is a proceeding in equity, and it is manifestly inequitable that either Jones or those standing in his right escape liability for a situation assumed by them, and, as we must find, then recognized as of binding force, and whose assumption seems fairly to have been part of the consideration paid by Jones for the Buckeye stock. In the situation presented, we think the petitioning coal companies cannot be heard to say that payment of the royalty, or the continuance of the mortgage lien upon the lands of the Buckeye Company, would violate the law."

V .

The Appeal Should be Dismissed or the Order Appealed From Affirmed.

Respectfully submitted,

JOHN F. WILSON,
Solicitor and Counsel for Appellee,
The Hocking Valley Railway Company.

JOHN F. WILSON,
A. C. REARICK,
PAUL SMITH,
of Counsel.

New York, April, 1925.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1924 1925

No. 368.

51

THE BUCKEYE COAL & RAILWAY COMPANY, *et al.*,
Appellants,

vs.

THE HOCKING VALLEY RAILWAY COMPANY, CEN-
TRAL UNION TRUST COMPANY OF NEW YORK,
THE UNITED STATES OF AMERICA,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION.

Brief for Appellee Central Union Trust Company of New York.

ARTHUR H. VAN BRUNT,
Solicitor for Appellee,
Central Union Trust Company of New York.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1924

No. 368

THE BUCKEYE COAL & RAILWAY COMPANY, *et al.*,
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THE HOCKING VALLEY RAILWAY COMPANY, CENTRAL UNION
TRUST COMPANY OF NEW YORK, THE UNITED STATES
OF AMERICA,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION.

BRIEF FOR APPELLEE
CENTRAL UNION TRUST COMPANY OF NEW YORK.

Statement.

The facts are so fully stated in the brief of our co-appellee, The Hocking Valley Railway Company (hereinafter called The Hocking Valley Company), as to preclude the necessity for any amplification thereof in the present brief. Reference is therefore made to the statement of the facts as set forth in the brief of The Hocking Valley Company on the present appeal.

ARGUMENT.**I.****The Appellants Are Without Standing to Prosecute an Appeal to This Court and the Appeal Should Therefore Be Dismissed.**

On this point we call attention to the argument presented on the motion to dismiss the appeal in the brief heretofore filed by the appellees, Central Union Trust Company of New York (hereinafter sometimes called the Trust Company) and The Hocking Valley Company. This argument is so fully stated in the brief of The Hocking Valley Company on the present appeal that no elaboration thereof is deemed requisite. We refer to the argument under Point I of The Hocking Valley Company's brief and authorities cited and adopt the same as a full and complete statement of our own position with respect to the matters there treated.

II.**The Court Below Properly Dismissed Appellants' Petition Because It Sought a Modification of a Final Decree Which the Court Was Without Jurisdiction to Grant.**

The Court when it made the original decree and the order of May 19, 1916, had before it the entire situation, and on this it approved the sale of the Buckeye Company stock to Jones, apparently believing that there was no substantial interference with free competition involved in the situation thus created (Rec., p. 113).

The Court below on the present application inclined to the view that the order of May 19, 1916, and the sale of the Buckeye Company stock thereunder

“exhausted the jurisdiction of this court over the specific question whether the situation created by the lien of the Hocking Valley mortgage upon the Buckeye Company’s lands, given to secure the Railroad’s indebtedness, in connection with the tonnage royalty provision, was so far unlawful as to require its elimination (Rec., p. 113).”

The action of the Court rendering the order of May 19, 1916, and the confirmation of the sale pursuant thereto, when considered in connection with the previous decree and series of orders, and the five-year period during which the last of these orders remained unchallenged, constituted a final adjudication, and should bar successful maintenance of the present proceeding.

The facts, argument, and authorities are set forth in greater detail under Point II of the brief of The Hocking Valley Company on the present appeal to which reference is hereby made.

III.

The Court Below Properly Dismissed Appellants’ Petition Because the Situation Therein Disclosed Involved No Violation of the Anti-Trust Act or of that Court’s Final Decree.

In addition to the argument and authorities outlined under Point III of the brief of The Hocking Valley Company to which reference is hereby made, the Court’s attention is called to the following:

Scope and Effect of Opinion and Decree.

On page 18 and again on page 23 of their brief the appellants contend that under the original decree in this

matter the entire combination of the railroad and coal properties pursuant to the reorganization scheme of January 4, 1899, is illegal and fraudulent. Under this premise the appellants argue that to give full force and effect to such opinion and decree and under the authority of the case of *Continental Company v. U. S.*, 259 U. S. 156, it is necessary to nullify the lien of the Mortgage upon the coal lands of the Buckeye Company and its provisions with respect to the two-cent royalty.

The fallacy of the foregoing argument may be perceived from analysis of the original opinion and decree hereunder and the subsequent history of the case, and from consideration of the true meaning of the *Continental* decision.

Trust Company not a Party when Opinion was Rendered.

The Central Union Trust Company (then Central Trust Company) was not a party to the action when the opinion of December 28, 1912 was handed down (Rec., p. 117).

Between that date and March 14, 1914, the date of the entry of the decree, the Trust Company as Trustee of the First Consolidated Mortgage of The Hocking Valley Railway Company and as Trustee under the agreement of April 30, 1908, was made a party (Rec., p. 166).

Therefore, while the Trust Company was a party to the decree it was not a party to the cause at the time when the original *opinion* was entered. It is therefore clear that any statements in the original opinion with respect to the entire separation of the coal and railway properties should be so construed as to preserve—in so far as consistent with the directions of the decree—the rights of the Trustee and of the bondholders whom it represents.

The true construction of the original opinion and decree as more fully explained below would seem to re-

quire separation of the coal and railway properties only to the extent legitimately required to prevent violation of public policy or the Sherman Anti-Trust Act.

The *Continental* case, *supra*, does not require the Court either to declare void the two-cent royalty provision or the lien of the mortgage upon the lands of the Coal Companies, nor does it require a sale of such properties in order to effectuate the complete separation contemplated by public policy and the Sherman Anti-Trust Act.

At most, the *Continental* case stands merely for the proposition that the Court has power to free properties from the consolidation tendency of a mortgage by relieving them from the lien and substituting a judicially ascertained equivalent in protection of the bondholders.

The doctrine of the *Continental* case does not require the exercise of such power, where not reasonably required to prevent violation of public policy or the Sherman Anti-Trust Act.

This is made clear by the Court in the *Continental* case, when it says on page 173:

“We have no desire to vary the security of the bondholders more than seems necessary to effect fully the purpose of the law. * * *”

In other words, under the doctrine of the *Continental* case, the Court may have power to declare the two-cent royalty provision void, and also to declare void or inoperative the lien of the mortgage upon the coal lands. But even though it has power to do the foregoing, it is nevertheless discretionary with the Court whether or not it will exercise such power. Because of the secondary nature of its security and the consequent lack of direct interest of The Hocking Valley Company in the aforesaid rights and properties, it seems clear, as the Court below decided, that neither public policy nor the Sherman Anti-Trust Act requires such separation as is de-

manded by the petition of appellants in the case at bar. In the proper exercise of its discretion, the Court rendering the original opinion of December 28, 1912, had not called for separation to the extent demanded by the appellants, and the Court in the present proceeding is not obligated either by the original decree or by the doctrine of the *Continental* case to compel such separation as is contended for by the appellants.

Though the nature of the pledged securities and the scope of The Hocking Valley mortgage were fully before the Court when it rendered the original opinion and decree herein, yet so far as disposition of the stocks pledged with the Trust Company was concerned, the decree in terms only ordered a sale of stock of the Sunday Creek Company. In fact the Trust Company had been brought into the case simply because all this security had been pledged to it and was in its possession (Rec., p. 166).

It was not until 1915 that the Government filed its supplemental petition for the sale free and clear of the mortgage of certain other securities (including the Buckeye stock) owned by The Hocking Valley Company and pledged to the Trust Company (Rec., p. 189).

In its answer to this petition the Trust Company set up that the securities had been validly pledged to it and it held the same solely as Trustee for the bondholders, none of whom were identified with the management or control of The Hocking Valley Company. It further claimed that there was no power reserved in the original decree to order the sale of other securities (Rec., pp. 194-201).

The proofs established the fact that the bondholders had no voice in the management of The Hocking Valley Company, and that pledges of the stock under the mortgage and trust agreement were validly made, but the Court held that such a pledge of securities was subject to the right to have the same relieved therefrom, provided

the pledge-holding thereof was in violation of the Sherman Anti-Trust Act, and provided payment was made to the Trustee for the benefit of the bondholders of the judicially ascertained equivalent of the securities released.

From that decree the Trust Company appealed to this Court. While such appeal was pending The Hocking Valley Company entered into negotiations with John H. Jones for the sale of the securities in question, resulting in a contract between them. The Trust Company was not a party to this contract, nor had it any connection therewith (Rec., pp. 57-62).

On October 5, 1916, The Hocking Valley Company filed its petition for an order approving said Jones as purchaser, and for the approval of the terms of the contract of sale. In that petition The Hocking Valley Company pointed out that the contract provided for due application to the Trust Company for the release of the pledged securities, and stated that if application in accordance with the provisions of the trust mortgage was thus made, in the event of the approval of the contract and upon the finding by the Court that the price fixed in said contract was the fair and reasonable value of the securities and that no better price could be obtained, the Trust Company would be willing to release the securities and to dismiss its pending appeal from the decree directing their sale (Rec., pp. 209-212).

It is evident that this allegation could only be made because of representations made by the Trust Company to The Hocking Valley Company and this constitutes a statement of the position of the Trust Company. In other words, the Trust Company insisted for its protection that the Court itself should pass upon the sufficiency of the amount paid for the securities release of which was sought, and agreed that if the Court, on the evidence before it, found this to be ample, then it (the Trust Com-

pany) would, upon proper application pursuant to the trust mortgage, release the securities in question upon the receipt of the purchase price.

This contract, which was before the Court when it made the order of May 19, 1916 approving the sale of the Buckeye stock, specifically referred to the mortgage on the Buckeye lands and the royalty provisions therein (Rec., p. 111), so that at that time the attention of the Court was clearly called to these factors. It is significant that with the mortgage and its royalty provisions sharply presented, the Court found nothing improper therein and made no reference thereto in its order or opinion. In fact it approved a sale price for the Buckeye stock substantially similar to its appraised value fixed when no question had been raised as to the lien of the mortgage or the validity of the royalty contract (Rec., p. 211).

IV.

The Court Below Properly Dismissed Appellants' Petition Because to Have Granted the Relief Therein Prayed Would Have Been Manifestly Inequitable.

The argument and authorities under Point IV of the brief of The Hocking Valley Company contain a thorough statement of our position with respect to the matters there set forth. In addition to the argument in said brief, to which reference is hereby made, we wish particularly to call the Court's attention to the significance of the price paid by Jones for the Buckeye stock, and to the other matters hereinafter set forth.

The petition of The Hocking Valley Company and Chesapeake & Ohio Railway Company, filed October 5, 1916, shows that the stock of the Buckeye Company had been appraised at \$18. a share, or \$45,000. in all (Rec.,

p. 211), by appraisers acting for The Hocking Valley Company and the Trust Company. That appraisal was made at a time prior to any challenge of the validity of the mortgage on the Buckeye lands or of the royalty contract contained therein. From the record it appears that in 1923 the Buckeye Company properties contained over 18,000,000 tons of unmined coal (Rec., p. 248). It is clearly apparent, therefore, that the sale of this stock, which was all the stock of the Buckeye Company and carried title to its properties, could only have been approved at such a price because of the lien of The Hocking Valley Company mortgage upon the Buckeye lands and the obligation to the Buckeye Company to pay a royalty of two cents a ton as provided in the mortgage. Unfortunately the record does not contain the full evidence which was given to the Court, but it is inconceivable that this meagre price for land having such a quantity of unmined coal could have been occasioned solely by improvident leases as suggested on pages 45-46 of the appellants' brief.

The conclusion is irresistible, that the price at which this Buckeye stock was sold was fixed because the Buckeye Company and its properties were subject to the lien of The Hocking Valley mortgage and it was liable for royalty payments provided for in the mortgage.

Both of these were mentioned and dealt with in the contract of sale negotiated between Jones and The Hocking Valley Company (Rec., p. 111) and there is no suggestion anywhere in that instrument of the slightest invalidity thereof or that their existence or provisions contravened the Sherman act. Consequently, the Central Union Trust Company, in view of the expressed retention thereof upon the determination of the application to sell to Jones, assumed they were to stand.

The Court had before it the entire situation, knew of the existence of this lien and royalty contract, also was

aware of the fact that the application then being made was in aid and furtherance of the government suit to dissolve this illegal combination, and yet made not the slightest suggestion that the mortgage or royalty contracts were invalid and approved a sales price for the Buckeye stock which was practically the figure at which it had been appraised prior to any challenge of the validity of the mortgage and royalty contracts.

Jones paid Fifty thousand dollars (\$50,000.) for the Buckeye stock and took the same over, and then promptly failed to pay the royalties provided for in the mortgage. When the Trustee brought suit for these royalties, he defended on the ground that the contract was invalid and that the lien thereof on the coal lands was in violation of the Sherman act. It was after the beginning of this suit by the Trustee that the Buckeye Company, then and now Jones' creature, brought the State Court action to get rid of the mortgage and the contract on the theory that they were a cloud on the title. The aid of the State Court was probably sought because that looked a more hopeful forum, as the Federal Court had approved the sale without any reservations or modifications in respect to the mortgage or royalty contract though the same had been clearly brought to its attention.

When the State Court action failed, as a last resort the petition was filed which is now before the court. By such procedure it sought to have its lands relieved from the lien of the mortgage and to avoid payment of royalties, and that too, though it paid the Fifty thousand dollars for the stock upon the theory that the Buckeye properties were burdened with this lien and contract. In other words, this was an effort by the Buckeye Company to free its property from a very substantial lien, subject to which the same was purchased, and which was a very important feature in the determination by the Court of the sufficiency of the purchase price.

Attitude of the Government.

The petition of the Buckeye Company was heard in June, 1922, and at the time of that argument the Government took no position whatsoever (Rec., p. 114).

Just about this time this Court decided the *Reading* case, reported as *Continental Ins. Co. v. U. S.* (*supra*). The Government in November, 1922, filed its petition, praying for relief if the Court found such holding to be in violation of the Sherman Anti-Trust Act, but only upon payment by the Buckeye Company to the Trustee for the rights to be thus relinquished (Rec., pp. 62-72).

Upon the argument the Government frankly stated it was because of the *Reading* decision that its petition had been filed, and that it would be perfectly satisfied to have the petition dismissed if the Court was of the opinion either that the holding was not in violation of the Sherman Act or was of such minor importance that it might be disregarded (Rec., p. 114).

Thereafter the Court handed down its opinion in which it called attention to the fact that it had approved the sale of the stock to Jones with full knowledge of the situation then complained of, and presumably without its occurring to the Court or to the Government's counsel that the same created a substantial interference with the free competition aimed at by the original decree. It also called attention to the fact that this was a proceeding in equity, and that it was manifestly inequitable that either Jones or the Buckeye Company should escape liability for a situation assumed by them, and which was then recognized as of binding force and effect, and whose assumption seemed fairly to be a part of the consideration paid by Jones for the Buckeye stock. It held therefore that the Buckeye Company could not be heard to complain in the premises and the petition was dismissed. It called attention to the fact that the Government admitted that the *Reading* case, decided six years after the

consummation of the transaction complained of, had impelled its action and found that by reason of the circumstances the interference with free competition was reduced to a minimum. The Court further said that this appeared particularly in view of the agreement of The Hocking Valley Company that its property might first be resorted to to satisfy the mortgage debt. The Court therefore dismissed the petition without prejudice to the Government to renew the same when, if ever, the situation might be thought to justify it (Rec., pp. 109-115).

Alleged Lack of Authorization of two-cent Royalty.

The appellants in their brief on pages 19 and 29-31 advance the argument that there was no due authority for the insertion of the two-cent royalty clause in the mortgage, and that the same is objectionable as giving the Railway an interest in the coal lands in violation of the Sherman act.

With respect to the alleged lack of authorization it seems clear that even if such lack existed, subsequent ratification and adoption of such clause by the Buckeye Coal Company validated the same. Moreover, the argument of lack of authorization is not open to the Buckeye Company in this proceeding, wherein the Buckeye Company must appear not to protect its private interests, but solely to protect the public interest.

As stated by the Court (Rec., p. 114):

“In the situation presented, we think the petitioning coal companies cannot be heard to say that payment of the royalty, or the continuance of the mortgage lien upon the lands of the Buckeye Company, would violate the law.

With respect to the contention that the two-cent royalty constitutes an injury to the public because of violation of the Sherman act, such contention is adequately

answered in the language of the Court (Rec., pp. 114-115):

“Whatever theoretically potential interference with free competition might otherwise be created by the railroad-mortgage lien upon the Buckeye lands in connection with the royalty tonnage provision, we think such interference practically reduced to a minimum by the fact that by the contract between Jones and the railway companies, the railway property must first be exhausted before resort can be had to the coal lands, in connection with the fact that no suggestion is made that the railroad property is not entirely adequate to meet the payment of the mortgage in full, and the payment of the mortgage puts an end to the royalty. Indeed, an affirmative inference more or less strong in favor of the adequacy of the railroad security seems fairly deducible from the record presented to us. We therefore think that it will be time enough to question the invalidity of the situation we are discussing when, if ever, it becomes acute.”

V.

The order of the Court below should be affirmed.

Respectfully submitted,

ARTHUR H. VAN BRUNT,
Solicitor for Appellee,
Central Union Trust Company of New York.

SUPREME COURT OF THE UNITED STATES.

No. 51.—OCTOBER TERM, 1925.

The Buckeye Coal and Railway Company and the Sunday Creek Coal Company, Appellants,	}	Appeal from the District Court of the United States for the Southern District of Ohio, Eastern Division.
<i>vs.</i>		
The Hocking Valley Railway Company, Central Union Trust Company of New York and the United States.		

[November 16, 1925.]

Mr. Chief Justice TAFT delivered the opinion of the Court.

The suit in equity in which this is an appeal was begun by the United States in the District Court for the Southern District of Ohio, Eastern Division, against the Hocking Valley Railway Company, five other railway companies, and three coal companies, and was heard before the three Circuit Judges of that circuit. It was a proceeding under the Anti-Trust Act to dissolve an illegal combination of the defendants to monopolize the business of transporting and selling coal from the coal fields of Ohio in interstate commerce. Act of February 11, 1903, 36 St. 723, ch. 544. A full hearing resulted, March, 1914, in finding that the illegal combination existed and a comprehensive decree radically dissolving the combination. (203 Fed. Rep. 295.) The Railroad Companies were directed to part with all their interests in the Coal Companies and the business of mining and selling coal was ordered to be separated from that of railway transportation by the sale of the stocks of the defendant Coal Companies held by the Railway Companies and the dissolving of other relations which had made the combination possible and effective. Jurisdiction of the cause was retained by the court for the purpose of making such other and further orders and decrees as might be necessary to the due execution of the decree and the complete dissolution of the combination and monopoly therein condemned.

The Buckeye Coal & Railway Company was not a party to the original suit. All of its stock was owned by the Hocking Valley Railway Company. Its property consisted of 11,000 acres of coal land in the coal fields of Ohio, with an estimated deposit of 18,000,000 tons. In 1899, the Buckeye Company had pledged its coal lands in a mortgage of the Hocking Valley Railway Company to the Central Trust Company to secure \$20,000,000 of the Railway Company's bonds. In the same mortgage, the Buckeye Company agreed to pay 2 cents royalty on each ton of coal mined by it to the Central Trust Company, the mortgage trustee, to be applied to the redemption of the bonds. The Buckeye Company was not an obligor on the bonds. The Hocking Valley Railway Company in addition to the pledge of its railway property, the Buckeye coal lands and the royalty, included in the mortgage also all the capital stock of the Buckeye Company. Upon an intervening petition of the original complainant, the United States, and after a hearing to which the Hocking Valley Railway Company and the Central Trust Company, the mortgage trustee, were parties, an order was made by the court by which the capital stock of the Buckeye Company was directed to be sold, freed from the lien of the mortgage, and subject to the approval of the court. This order was made May 19, 1919. The Hocking Valley Railway Company then made a contract with one John S. Jones, to sell him all the Buckeye Coal Company stock for \$50,000 under a contract by which it was agreed that the stock sold should be released from the pledge of the mortgage. There was an express stipulation that the contract was not to impair the covenants of the Buckeye Company in the Hocking Valley Railway mortgage in respect of the lands of the Coal Company or of the 2 cents royalty, except that the Hocking Company agreed that its railroad property pledged under the mortgage should be first exhausted before any recourse should be had to the coal lands of the Buckeye Company. The contract of purchase was made subject to the presentation of its terms to the court and its approval. On October 5, 1916, the Hocking Valley Company reported the sale to the court, reciting the contract. On November 10, 1916, the District Court, after reciting the report of the contract of purchase and the dismissal of the appeal, and the tender of the purchaser for examination found the purchaser satisfactory and approved the purchase. Jones took

possession of the stock and organized a new company, the Sunday Creek Coal Company, which by exchange of stock succeeded to the ownership of the coal lands of the Buckeye Company and that of other companies. It is conceded by counsel for the Coal Companies that the value of the property of the Railway Company which must first be resorted to to pay the bonds is far greater than the amount due on them so that the lien on the coal lands is negligible.

In April, 1919, the Coal Companies brought a suit in a state court against the Central Trust Company and the Hocking Valley Railway Company in Ohio to quiet their title to the coal lands. The Common Pleas Court of Ohio, after a full hearing, denied the prayer and sustained the validity of the mortgage lien upon the coal lands and the royalty. The decree of the Common Pleas Court was affirmed in the intermediate Appellate Court and in the Supreme Court of Ohio. The final disposition of the cause was on June 7, 1921. This is pleaded herein by the Central Trust Company, trustee, as *res judicata*.

The Coal Companies on December 6, 1921, applied for leave to the court below to file the intervening petition here the subject of consideration. Leave was granted and the Hocking Valley Railway Company and the Central Trust Company parties were required to answer. The prayer is that they be enjoined from enforcing the mortgage lien upon the coal lands of the Buckeye Company or the two cents a ton royalty. The ground urged is that the maintenance of these two liens constitutes such a relation between the Coal Companies and the Railway Company as to be a violation of the main decree and the Anti-Trust law, in that it furnishes a motive for the Railway Company illegally to favor the Coal Companies in their interstate transportation of coal to the selling markets. Thereafter the United States by leave also filed a petition against the same defendants in which in the public interest it asked that the association between the Railway Company and the Coal Companies be dissolved by cancelling the liens with or without compensation.

The petition of the United States and the petition of the Coal Companies came on for hearing together. The District Court denied the petition of the Coal Companies, on the ground first that the order of November 10, 1919, approving the sale of the

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stock of the Buckeye Company was a final order and the District Court had no power to alter it, and second that the decree against the two companies in the State Court was *res judicata*. As to the petition of the United States, the court conceded that under the reservation of the main decree such an application could be made to it for further relief to achieve the purpose of the main decree. It said that the fact that the court had approved the sale of the stock of the Buckeye Company indicated that the court had found that the release of the liens was not essential to carrying out the purpose of the decree and did not involve such an association between the Railway Company and the Coal Company as to interfere with the effectiveness of that decree. But while dismissing the petition, it left opportunity open in its order to the United States to apply for further relief in the matter, if such an association came to be used as a means of defeating the main decree. The United States has not appealed from this order of dismissal of its petition. The only appeal is that of the two Coal Companies.

There is an embarrassment of reasons why the appeal of the two Coal Companies should fail. Their intervening petition seeks to vary or set aside the order of the District Court which necessarily approved not only the sale of the Buckeye stock but also the stipulation in the contract of sale that the pledge of the coal lands and the 2-cent royalty should be unimpaired. That order was made November 10, 1916. It was a final order in respect to the sale approved. The clause of reservation in the main decree, as the court below said, was exhausted so far as that sale was concerned. All the facts, including the contract of purchase, were then before the court. No new ones have since been developed. The term has long passed within which that order could be altered by the court which made it.

Second, the validity of the covenants of the mortgage entered into by the Buckeye Company was affirmed by the decree in the litigation between the Hocking Valley Railway Company, the Central Trust Company, the mortgage trustee, and the two Coal Companies, appellants. This was *res judicata*, so far at least as the personal and private rights of the Coal Companies were concerned.

Third, even if we assume that the United States might apply under the reservation clause to the District Court to direct the

cancellation of the mortgage lien on the coal lands, and the covenant as to the royalty on a showing that they were being used to continue the illegal combination condemned in the main decree, it could only be done in the interest of the public represented by the United States. The petition of the United States on this head was denied by the court below and the United States has taken no appeal. The status of the two Coal Companies in the court below and here is merely that of informers. Their attitude, if it is nicely analyzed, seems to be that unless the mortgage lien on their coal lands to secure the railway bonds, and the 2 per cent. royalty are cancelled, they may be induced to enter a conspiracy with the Railway Company by which the Railway Company will grant them unlawful and discriminating favors in railway transportation to enable them to increase the coal mined and the royalty to be applied to redeem the bonds. They wish to have this temptation to crime on their part removed, and incidentally have themselves relieved from obligations which were recognized by the court as valid and binding in the judicial sale of the entire capital stock of the Buckeye Company and which as against them have been adjudged valid by the courts of Ohio. The United States which must alone speak for the public interest does not appear with them on this appeal. They have therefore no *locus standi*. *United States v. Northern Securities Co.*, 128 Fed. 868.

Underneath all these reasons for dismissing the appeal is the fundamental objection that these Coal Companies presented no case upon their petition justifying their intervention. They were not parties to the original suit. Their interest was not of persons who had suffered by the original combination made the subject of the main decree who might have had relief under the 16th section of the amendment to the Anti-Trust Act, October 15, 1914, c. 323 (38 St. 736). They were really put forward as intervening parties in the interest of Jones the purchaser at the judicial sale of all their stock through which he continues to manage them. His, and therefore their only claim to be heard at all must be based on the decree confirming the purchase, part of the consideration for which as approved by the court they now seek to impeach.

Decree affirmed.

